DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-3
Title: Jackie Hosang Lawson and Jonathan M. Zang, Petitioners
v.
FMR LLC, et al.
Docketed: July 2, 2012
Lower Ct: United States Court of Appeals for the First Circuit
Case Nos.: (10-2240)
Decision Date: February 3, 2012
Rehearing Denied: April 6, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jun 28 2012	Petition for a writ of certiorari filed. (Response due August 1, 2012)
Jul 19 2012	Order extending time to file response to petition to and including August 24, 2012.
Jul 30 2012	Brief amicus curiae of National Whistleblower Center filed.
Aug 24 2012	Brief of respondents FMR LLC, et al. in opposition filed.
Sep 5 2012	DISTRIBUTED for Conference of September 24, 2012.
Sep 5 2012	Reply of petitioners Jackie Hosang Lawson and Jonathan M. Zang filed. (Distributed)
Oct 1 2012	DISTRIBUTED for Conference of October 5, 2012.
Oct 9 2012	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Apr 9 2013	Brief amicus curiae of United States filed.
Apr 23 2013	DISTRIBUTED for Conference of May 9, 2013.
Apr 23 2013	Supplemental brief of petitioners Jackie Hosang Lawson and Jonathan M. Zang filed. (Distributed)
Apr 26 2013	Supplemental brief of respondents FMR LLC, et al. filed. (Distributed)
May 13 2013	DISTRIBUTED for Conference of May 16, 2013.
May 20 2013	Petition GRANTED.
Jun 12 2013	The time to file the joint appendix and petitioners' brief on the merits is extended to and including July 31, 2013.
Jun 12 2013	The time to file respondents' brief on the merits is extended to and including September 30, 2013.
Jul 18 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.

Jul 31 2013	Brief of petitioners Jackie Hosang Lawson and Jonathan M. Zang filed.
Jul 31 2013	Consent to the filing of amicus curiae briefs, in support of eitiher party or of neither party received from counsel for the petitioners.
Jul 31 2013	The time to file the joint appendix is further extended to and including August 14, 2013.
Aug 7 2013	Brief amicus curiae of United States filed.
Aug 7 2013	Brief amicus curiae of National Employment Lawyers Association and Government Accountability Project filed.
Aug 7 2013	Brief amicus curiae of National Whistleblower Center filed.
Aug 13 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 14 2013	Joint appendix filed. (Statement of costs received).
Aug 20 2013	SET FOR ARGUMENT on Tuesday, November 12, 2013.
Aug 26 2013	CIRCULATED.
Sep 17 2013	Record from U.S.D.C. for District of Massachusetts is electronic.
Sep 18 2013	Record received for U.S.C.A. for 1st Circuit. (1box)
Sep 30 2013	Brief of respondents FMR LLC, et al. filed. (Distributed)
Oct 4 2013	Brief amicus curiae of Society for Human Resource Management filed. (Distributed)
Oct 7 2013	Brief amicus curiae of The Chamber of Commerce of the United States of America filed. (Distributed).
Oct 7 2013	Brief amici curiae of New England Legal Foundation and Associated Industries of Massachusetts filed. (Distributed)
Oct 7 2013	Brief amicus curiae of Securities Industry and Financial Markets Association filed. (Distributed)
Oct 7 2013	Brief amicus curiae of Investment Company Institute filed. (Distributed)
Oct 7 2013	Brief amici curiae of Former SEC Officials filed. (Distributed)
Oct 7 2013	Brief amicus curiae of National Federation of Independent Business Small Business Legal Center filed. (Distributed)
Oct 7 2013	Brief amicus curiae of Equal Employment Advisory Council filed. (Distributed)
Oct 21 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 30 2013	Reply of petitioners Jackie Hosang Lawson and Jonathan M. Zang filed. (Distributed).
Nov 12 2013	Argued. For petitioners: Eric Schnapper, Seattle, Wash.; and Nicole A. Saharsky, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: Mark A. Perry, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

No. 12-3

In The Supreme Court of the United States

JACKIE HOSANG LAWSON and JONATHAN M. ZANG,

Petitioners,

v.

FMR LLC, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, forbids a publicly traded company, a mutual fund, or "any ... contractor [or] subcontractor ... of such company [to] ... discriminate against an *employee* in the terms and conditions of employment because of" certain protected activity. (Emphasis added). The First Circuit held that under section 1514A such contractors and subcontractors, if privately-held, may retaliate against their own employees, and are prohibited only from retaliating against employees of the public companies with which they work.

The question presented is:

Is an employee of a privately-held contractor or subcontractor of a public company protected from retaliation by section 1514A?

PARTIES

The petitioners are Jackie Hosang Lawson and Jonathan M. Zang.

The respondents are FMR LLC, FMR Co. Inc., FMR Corp., Fidelity Brokerage Services, LLC, and Fidelity Management & Research Company. All of the respondents are privately-held companies.

No Fidelity mutual fund is a party to this action.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties	ii
Opinions Below	1
Jurisdiction	1
Statutory Provisions and Regulations Involved	2
Statement of the Case	2
Reasons for Granting the Writ	8
I. Introduction	8
II. There Is A Clear Conflict Between The Decision of The First Circuit and The Decision of the Department of Labor Administrative Review Board in *Spinner v. Landau*	13
III. The First Circuit Has Decided A Question of Great Importance That Should Be Resolved by This Court	21
IV. The Question Presented Should Be Resolved by This Court Without Further Delay	33
Conclusion	38

Appendix

Opinion of the Court of Appeals for the First Circuit, February 3, 2012 ..... 1a

TABLE OF CONTENTS – Continued

Page

Memorandum and Order of the District Court for the District of Massachusetts, March 31, 2010 .....76a

Order of the Court of Appeals for the First Circuit Denying Rehearing, April 6, 2012 .....134a

Decision of the Administrative Review Board, *Spinner v. David Landau and Associates, LLC*, May 31, 2012.....136a

Statutes and Regulations Involved.....200a

TABLE OF AUTHORITIES

Page

CASES

Ameristar v. Administrative Review Board, 650 F.3d 562 (5th Cir. 2010) 20

Bechtel v. Competitive Tech., 448 F.3d 469 (2d Cir. 2006) 11

Bechtel v. Secretary of Labor, 50 F.3d 926 (11th Cir. 1995) 20

Johnson v. Siemens Bldg. Tech., 2011 WL 1247202 (ARB March 31, 2011) 11

Jones v. Harris Associates L.P., 130 S.Ct. 1418 (2010) 33

R & B Transp., LLC v. United States Department of Labor, 618 F.3d 37 (1st Cir. 2010) 20

SEC v. Gemstar-TV Guide Int'l, 401 F.3d 1031 (9th Cir. 2005) 36

Solis v. Tennessee Commerce Bancorp, Inc., 13 F.Supp.2d 701 (M.D.Tenn. 2010) 11

Spinner v. David Landau and Associates, LLC, 2012 WL 2073374 (ARB May 31, 2012) ..... *passim*

United States v. Marino, 654 F.3d 310 (2d Cir. 2011) 11

Walters v. Deutsche Bank AG, 2009 WL 6496755 (ALJ March 23, 2009) 28

STATUTES AND REGULATIONS

15 U.S.C. § 78l 12

TABLE OF AUTHORITIES – Continued

Page

15 U.S.C. § 78o(d) 12
15 U.S.C. § 78u-6 31
17 C.F.R. § 205.2(e) 30
17 C.F.R. § 205.3(b) 30
17 C.F.R. § 240.10A-3(b)(3)(i) 29
17 C.F.R. § 240.21F-4(a)(4) 31
17 C.F.R. § 240.21F-4(b)(7) 31
17 C.F.R. § 240.21F-4(c)(3) 31
17 C.F.R. § 240.21F-6(a)(4) 31
18 U.S.C. § 1514A ..... *passim*
18 U.S.C. § 1514A(a) 11, 17, 18, 28
18 U.S.C. § 1514A(b)(1)(A) 14
18 U.S.C. § 1514A(b)(1)(B) 14
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1292(b) 7
49 U.S.C. § 42121(b)(4) 14
60 Fed.Reg. 18818 (April 16, 2003) 29, 30
76 Fed.Reg. 34300 (June 13, 2011) 31
Dodd-Frank Act 11, 31
Investment Company Act 33

TABLE OF AUTHORITIES – Continued

Page

Sarbanes-Oxley Act ..... *passim*

Securities and Exchange Act of 1934 ..... 3, 6, 11

BRIEFS

Brief of *Amicus Curiae* Chamber of Commerce of the United States of America in Support of Appellants' Petition for Interlocutory Review 28

Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellees 24

Brief of the Securities and Exchange Commission as Amicus Curiae, *Klopfenstein v. Administrative Review Board*, No. 10-60144 (5th Cir.) 34

Brief of the Securities and Exchange Commission as Amicus Curiae in Support of Plaintiff-Appellees 23, 25, 26

OTHER AUTHORITIES

E. Gressman, K. Geller, S. Shapiro, T. Bishop and E. Hartnett, SUPREME COURT PRACTICE (9th ed. 2007) 19

http://www.seyfarth.com/publications/omm060612, visited June 12, 2012 20

Letter of Lisa A. Rickard, President, U.S. Chamber Institute for Legal Reform, to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, Dec. 17, 2010 32

S.Rep. 107-146 ..... *passim*

Petitioners Jackie Hosang Lawson and Jonathan M. Zang respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on February 3, 2012.

OPINIONS BELOW

The February 3, 2012 opinion of the Court of Appeals, which is reported at 670 F.3d 61 (1st Cir. 2012), is set out at pp. 1a-75a of the Appendix. The April 6, 2012 order of the Court of Appeals denying rehearing and rehearing en banc, which is not reported, is set out at pp. 134a-135a of the Appendix. The March 31, 2010 Memorandum and Order of the District Court for the District of Massachusetts, which is reported at 724 F.Supp.2d 141 (D.Mass. 2010), is set out at pp. 76a-133a of the Appendix.[1]

JURISDICTION

The decision of the Court of Appeals was entered on February 3, 2012. A timely petition for rehearing and rehearing en banc was denied on April 6, 2012.

[1] The District Court opinion certifying the question in this case for interlocutory appeal is reported at 724 F.Supp.2d 167 (D.Mass. 2010).

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The statutory provisions and regulations involved are set out in the Appendix.

STATEMENT OF THE CASE

Ten years ago, in the wake of the Enron and other financial scandals, Congress enacted the Sarbanes-Oxley Act, section 806 of which protects whistleblowers who disclose fraud or certain other unlawful activity to company management, to federal agencies, or to Congress. 18 U.S.C. § 1514A. In the instant case, over the vociferous objection of both the SEC (which enforces federal securities laws) and the Department of Labor (which is responsible for enforcing section 1514A), a sharply divided First Circuit held that section 1514A does not protect whistleblowers at privately-held firms, such as investment advisers or accountants, which are contractors or subcontractors for publicly traded companies or mutual funds.

> The facts here ... represent a paradigm that Congress intended to address in Section 806: A public company's private agent or contractor retaliating against an employee of that

> private firm for blowing the whistle on a potential violation of the federal securities laws....

(Brief of the Securities and Exchange Commission as Amicus Curiae in Support of Plaintiff-Appellees, p. 3.) Less than four months after the First Circuit decision, the Administrative Review Board ("ARB") of the Department of Labor, emphatically rejecting the reasoning of the court of appeals, held that section 1514A does protect such whistleblowers. *Spinner v. David Landau and Associates, LLC*, 2012 WL 2073374 (ARB May 31, 2012). The Board's decision is controlling in the administrative adjudication of section 1514A claims arising in every circuit other than the First Circuit. (*See* App. 145a n.10).

The defendants are the privately-held parent company and several subsidiary companies that operate the Fidelity family of mutual funds, the largest mutual fund company in the United States, investing approximately $1.4 trillion on behalf of millions of fund investors. Each of the hundreds of Fidelity mutual funds is a separate registered investment company required to file reports with the SEC under section 15(d) of the Securities and Exchange Act of 1934. 15 U.S.C. § 78o(d). At Fidelity, as is true of the mutual fund industry generally, a mutual fund itself has no employees of its own. Rather, the directors of a mutual fund contract with an "investment adviser," which in turn conducts all the activities of the funds, making day to day investment decisions, performing a range of management

and administrative tasks, and preparing reports for shareholders and the SEC. Employees in the mutual fund industry ordinarily work for mutual fund adviser or sub-advisers, not for a mutual fund itself. The defendants in this case are investment advisers, or sub-advisers, to particular Fidelity mutual funds.

Jackie Hosang Lawson was a Fidelity employee for fourteen years; at the time of the events giving rise to this action Lawson was a Senior Director of Finance. Beginning in 2005, Lawson raised a series of objections to the manner in which FMR Co., the investment adviser to the Fidelity mutual funds, and its Fidelity Brokerage Services, were calculating the expenses that they reported as having been incurred in carrying out its contractual obligations to operate those funds. The amount of those expenses determined the amount of profit reported by FMR Co., and ultimately affected the amount of the fee which the mutual funds would pay to FMR Co. By inflating its expenses, FMR Co. could effectively increase the fees it would earn from the mutual funds, fees ultimately paid by the shareholders of the mutual funds. Lawson objected both to the manner in which the expenses had been calculated and to the failure of FMR Co. to disclose the disputed methodology to the Trustees, Directors or Audit Committee of the Fidelity Mutual Funds. The complaint alleged that approximately $100 million was being improperly treated as an expense for providing shareholders with information relating to the status of their existing accounts in Fidelity mutual funds. When Fidelity officials

persisted in this misallocation of expenses, Lawson wrote to Fidelity's General Counsel, explaining the problem and expressing the concern that the scheme constituted fraud against the mutual funds' shareholders. Lawson also alleged that a group within Fidelity Brokerage had improperly retained $10 million in fees that belonged to third-parties. (App. 80a and n.2).

In response to her repeated objections, Lawson was subjected to a series of adverse actions. Lawson filed complaints about this retaliation with the Occupational Safety and Health Administration ("OSHA") of the Department of Labor, the federal agency responsible for administrative enforcement of section 1514A. In July 2007 a supervisor advised Lawson that she should take a "sabbatical" because "it was impossible for her to continue working at Fidelity Investments because of the claims she had made to OSHA and the SEC."[2] In November 2007 Lawson resigned, contending that the defendants' campaign of harassment had made her working conditions intolerable.

Jonathan Zang worked for several of the respondents, most recently FMR Co., Inc., as an equity research analyst. In early 2005 Zang objected to a draft Statement of Additional Information which the defendants proposed to file with the SEC. Zang

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[2] Lawson Amended Complaint, ¶ 65.

pointed out that the Statement contained misleading information about the manner in which portfolio managers were compensated. After several emails and a meeting between Zang and higher officials, Fidelity agreed to revise the statement along the lines Zang had urged. During the same period Zang also objected that the defendants were operating several "veiled index funds," funds which are essentially unmanaged index funds but for which the Fidelity investment adviser was improperly collecting a fee for active management that had not really occurred. In June 2005, two months after the defendants had submitted the revised Statement to the SEC, Zang was dismissed. Zang, like Lawson, filed a complaint with OSHA.

Lawson and Zang ultimately commenced the instant actions in federal district court. Fidelity moved in each case to dismiss the complaints. Lawson and Zang were both employees of one of the private Fidelity entities; neither worked for any of the Fidelity mutual funds, none of which had any employees. Fidelity argued that the only "employees" protected from retaliation by section 1514A are individuals who work for a publicly traded company or for a company, such as a mutual fund, required to file reports under section 15(d) of the Securities and Exchange Act, firms which the courts below referred to as "public companies." Section 1514A does forbid retaliation by a "contractor" of such a public company. Fidelity insisted, however, that section 1514A does not bar a contractor from retaliating against its *own*

employees, but only forbids a contractor to somehow retaliate against an employee of the public company with which it is doing business.

The District Court denied Fidelity's motions to dismiss.[3] It concluded that section 1514A can apply to employees of contractors, not themselves public companies, that have contracts with public companies such as a mutual fund. The District Court specifically held that section 1514A protects employees of contractors that engage in activity "that relates to fraud against shareholders." (App. 116a). The District Court certified for interlocutory appeal under 28 U.S.C. § 1292(b) the question of whether section 1514A applies to employees of contractors, and the court of appeals granted the petitions for interlocutory review. (App. 8a-9a). The Department of Labor[4] and the SEC[5] filed amicus briefs urging the First Circuit to affirm the District Court opinion.

A sharply divided panel of the First Circuit overturned the District Court decision and ordered the dismissal of the complaints. The majority reasoned that the only "employee[s]" protected by section 1514A are individuals who work for a public company. (App. 10a-51a). The majority therefore concluded that section 1514A only forbids contractors

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[3] Although the cases were not consolidated, the District Court considered and resolved both motions in a single decision.

[4] 2011 WL 1977768.

[5] 2011 WL 1977769.

and subcontractors to retaliate against employees of the public companies with which they work, and permits those contractors and subcontractors to retaliate against their own employees. A lengthy dissent argued that section 1514A does protect employees of contractors and subcontractors that do business with public companies.

On April 6, 2012, the First Circuit, by a vote of 3 to 2, denied a timely petition for rehearing en banc. (App. 134a-135a). Two months later the Administrative Review Board of the Department of Labor reached the opposite conclusion, holding that employees or such contractors and subcontractors are protected by section 1514A. *Spinner v. David Landau and Associates, LLC*, 2012 WL 2073374 (ARB May 31, 2012) (App. 136a-199a).

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

The Sarbanes-Oxley Act was adopted in 2002 following the collapse of a series of major corporations, most notably Enron, which (with the involvement of its accounting firm, Arthur Andersen) had used a variety of accounting and other tricks to hide losses and deceive investors.

> Enron apparently, with the approval or advice of its accountants, auditors and lawyers, used thousands of off-the-book entities to

> overstate corporate profits, understate corporate debts and inflate Enron's stock price.... The actions of Enron's ... accountants, ... and lawyers exhibit a "Wild West" attitude which valued profit over honesty.... Much of this conduct occurred with "extensive participation and structuring advice from [the accounting firm of Arthur] Andersen, which was.... serving as ... "independent" auditor for Enron.

(S.Rep. 107-146, pp. 2-3). Similar schemes preceded the collapse of a number of other companies, including Tyco International Ltd. and WorldCom, Inc., causing severe losses to employees, retirees, pension funds, and private investors, and seriously undermining public confidence in the stock market.

Congress concluded that this financial chicanery had continued in part because those who were aware of the misconduct were deterred from reporting it.

> In a variety of instances when corporate employees at both Enron and Andersen attempted to report or "blow the whistle" on fraud ... they were discouraged at nearly every turn.... An Andersen partner was apparently removed from the Enron account when he expressed reservations about the firm's financial practices in 2000. These examples ... expose a culture, supported by law, that discourage[s] employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally. This "corporate code of

> silence" not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. The consequences of this corporate code of silence for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied.

(S.Rep. 107-146, p. 4-5) (footnote omitted). Federal law prior to the enactment of Sarbanes-Oxley afforded no protection to those who might have reported these schemes.

> [C]orporate whistleblowers are left unprotected under current law. This is a significant deficiency because often, in complex fraud prosecutions, these insiders are the only firsthand witnesses to the fraud. They are the only people who can testify as to "who knew what, and when," crucial questions ... in all complex fraud investigations.

(S.Rep. 107-146, p. 10).

The Sarbanes-Oxley Act responded to these financial scandals by imposing new substantive requirements on publicly owned corporations and their lawyers and accountants, and by enacting in section 806 of the Act a prohibition against retaliating

against those who report certain types of misconduct, such as violations of the securities laws.[6]

Section 806(a) of Sarbanes-Oxley, now codified in 18 U.S.C. § 1514A(a), provided[7] that

> [n]o company with a class of securities registered under section 12 of the Securities Exchange Act ... , or that is required to file reports under section 15(d) of the Securities Exchange Act ... , or any officer, employee,

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[6] "The Senate Judiciary Committee's report on the Act ... listed whistleblower protection as one of three main purposes of the Act." *Solis v. Tennessee Commerce Bancorp, Inc.*, 13 F.Supp.2d 701, 714 (M.D.Tenn. 2010). Congress "viewed protecting whistleblowers as crucial means for assuring that corporate fraud and malfeasance would be publicly exposed and brought to light from behind the corporate veil." *Johnson v. Siemens Bldg. Tech.*, 2011 WL 1247202 at *10 (ARB March 31, 2011). "[W]histleblower tips are among the most effective means of revealing financial frauds and accounting scandals." *United States v. Marino*, 654 F.3d 310, 322 (2d Cir. 2011).

> Congress recognized that the problem was an intractable one, and that a number of strong enforcement tools would be necessary.... Congress also recognized that for *any* of these tools to work, the law had to protect whistleblowers from retaliation.... Congress made clear ... that it viewed corporate whistleblowers as ... essential ... combatants against corporate malfeasance.

Bechtel v. Competitive Tech., 448 F.3d 469, 484-86 (2d Cir. 2006) (Straub, J., dissenting) (emphasis in original).

[7] The Dodd-Frank Act amended section 1514A to apply as well to certain subsidiaries of public companies and to certain nationally recognized statistical rating organizations. (*See* App. 204a).

> contractor, subcontractor, or agent of such company may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against *an employee* in the terms and conditions of employment because of any [protected] act done by the employee....

(Emphasis added). Companies whose securities are registered under section 12 are commonly referred to as publicly traded companies, because section 12 deals primarily with the registration of corporations that are traded on the national stock exchanges. 15 U.S.C. § 78l. Companies required to file reports under section 15(d) are generally those firms (such as mutual funds) that issue securities that may be sold to the public, but that are not publicly traded companies subject to section 12. 15 U.S.C. § 78o(d). The lower courts use the phrase "public company" to encompass both firms that are publicly traded (and thus subject to section 12) and firms that are not traded on a national exchange but are subject to section 15(d).

Section 1514A expressly applies to contractors and subcontractors of these public companies, as well as to the public companies themselves. Often, as in the instant case, the contractors and subcontractors – like the Arthur Andersen firm implicated in the Enron scandal – are not themselves public companies. The question that divides the First Circuit and the Administrative Review Board concerns the identity of the "employee[s]" against whom a contractor or subcontractor is forbidden to retaliate.

A majority of the First Circuit held that under section 1514A privately-held contractors and subcontractors can retaliate against *their own* employees, and are prohibited only from retaliating against employees of the public companies with which they work. As applied to the participants in the original Enron scandal, the First Circuit means that section 1514A would only have forbidden Arthur Andersen from somehow retaliating against a whistleblower who worked for Enron itself, but would have allowed Arthur Andersen to use retaliation to prevent its own employees from reporting Enron-related fraud to the SEC, to the Congress, or to managers or directors of either firm. Both the Department of Labor, which is responsible for enforcing section 1514A, and the SEC, which enforces the securities laws, emphatically disagreed with the First Circuit's narrow interpretation of the statute.

II. THERE IS A CLEAR CONFLICT BETWEEN THE DECISION OF THE FIRST CIRCUIT AND THE DECISION OF THE DEPARTMENT OF LABOR ADMINISTRATIVE REVIEW BOARD IN *SPINNER V. LANDAU*

The First Circuit in the instant case held that section 1514A does not protect employees of privately held contractors or subcontractors that work with public companies. "[We] read[ ] 'employee' as excluding from coverage employees of ... contractors, subcontractors and agents of public companies...." (App. 16a). Less than four months later, the Administrative

Review Board of the Department of Labor ("ARB") unanimously reached the opposite conclusion. "The overall statutory framework and purpose demonstrate, indeed require, that section 1514A protects whistleblowing by employees of contractors and subcontractors to the public company." *Spinner v. David Landau and Associates, LLC*, 2012 WL 2073374 (ARB May 31, 2012) (App. 161a). Because the ARB will apply the decision in *Spinner* to administrative claims arising in every circuit other than the First Circuit, this conflict should be resolved by this Court. (*See* App. 145a n.10).

Section 1514A establishes two distinct enforcement mechanisms, one administrative and the other judicial. First, an individual may pursue an administrative complaint, filing a complaint with OSHA, followed by discovery and a hearing before an administrative law judge and ultimately an appeal to the Administrative Law Board of the Department of Labor.* 18 U.S.C. § 1514A(b)(1)(A). Second, an aggrieved individual may bring a civil action in district court, provided that he or she first submits a complaint to the Secretary of Labor and waits 180 days. 18 U.S.C. § 1514A(b)(1)(B). Under section 1514A the complainant is permitted to choose between administrative and judicial adjudication. The stark difference between the First Circuit decision in *Lawson* and the

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* Final decisions by the ARB are subject to limited judicial review. 49 U.S.C. § 42121(b)(4).

ARB decision in *Spinner* is now of controlling importance to a complainant's choice of forum.

The First Circuit and the ARB were particularly deliberate in precipitating this conflict. The First Circuit was well aware that even before *Spinner* the ARB had held that section 1514A is not limited to employees of public companies.[9] The court of appeals expressly refused to give any weight to that earlier ARB decision. The panel majority then went further and preemptively disagreed in advance with any future more definitive ARB decision. "[I]f there were an on-point holding of the ARB, it might be entitled to some deference as to any ambiguity in the statute. The point is irrelevant.... [W]e find no ambiguity, so no deference is owed." (App. 50a).[10] The First Circuit repeatedly insisted that the text of section 1514A was crystal clear.[11]

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[9] "In dicta to which no deference could be owed, the ARB stated [in *Johnson v. Siemens Technologies, Inc.*] that SOX's 'legislative history demonstrates that Congress intended to enact robust whistleblower protections for more than employees of publicly traded companies.' 2011 WL 1247202 at *12." (App. 50a-51a n.25; *see* App. 14a n.7).

[10] "Because the term 'employee' in § 1514A(a) is not ambiguous, we would not defer to an administrative agency's contrary determination...." (App. 46a).

[11] App. 22a ("We do not think there is any ambiguity left"), 31a n.15 ("we conclude that the text of § 1514A(a) is unambiguous"), 49a ("the text of the statute does not permit even [*Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1044)] deference"), 51a ("we view the text of § 1514A(a) as clear").

In its post-*Lawson* decision, on the other hand, the ARB emphatically rejected the holding of the First Circuit. "The First Circuit's *Lawson* holding is not controlling in this case, and we decline to adopt it.... [W]e cannot conclude that Section 806 is limited to employees of public companies." (App. 145a). The ARB pointedly objected that the First Circuit had adopted its narrow construction of section 1514A "notwithstanding" the ARB's earlier decisions which had "repeatedly interpreted Section 806 as affording whistleblower protection to employees of contractors, subcontractors or agents of publicly traded companies, regardless of the fact that the contractor, subcontractor or agent was not itself a publicly traded company." (App. 143a). The ARB took the unusual step of deliberately issuing an exhaustive rebuttal to the First Circuit opinion, explaining that "in light of the First Circuit's decision in *Lawson*, it is imperative to fully explain the basis for our holding." (App. 145a). One member of the ARB added a lengthy concurring opinion for the express purpose of spelling out in even greater detail why he believed that the reasoning of the First Circuit was unsound. (App. 167a, 173a). Both the majority and concurring ARB opinions repeatedly cited the reasoning of the dissenting opinion in the First Circuit.[12]

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[12] App. 149a, 154a n.15 (majority opinion), 180a, 180a n.41, 181a n.43, 188a (Brown, J. concurring).

The First Circuit and ARB decisions systematically canvassed the same grounds and arrived at diametrically opposed conclusions. The First Circuit insisted that "the more natural reading" of the text of section 1514A(a) is limited to protecting employees of public companies. (App. 16a). The ARB concluded, to the contrary, that "[t]he plain language of the statute does not restrict its application to employees of publicly held companies." (App. 148a). The First Circuit asserted that its construction of section 1514A had not rendered meaningless the statutory language applying to contractors and subcontractors.[13] The ARB reasoned that limiting section 1514A(a) to employees of public companies would render superfluous the statutory language forbidding retaliation by contractors and subcontractors, because it would be virtually impossible for a contractor or subcontractor to retaliate against an employee of the public company. (App. 150a). The First Circuit argued that "employee" must refer only to employees of a public company because section 1514A(a) forbids retaliation *by* employees (App. 18a); the ARB rejected that reasoning. (App. 149a). The First Circuit had relied particularly on the heading of section 1514A(a), which it believed demonstrated that Congress intended to protect only employees of public companies. (App. 19a-22a). The ARB concluded that the heading conveyed no such meaning. (App. 151a-152a).

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[13] App. 17a (majority's construction "does not violate the rule against rendering superfluous any statutory language").

The First Circuit asserted that its narrow "reading of 'employee' ... is ... strongly confirmed by the pre-passage legislative history of this section." (App. 16a; *see* App. 37a). The ARB concluded, to the contrary, that "[n]othing in the SOX's legislative history indicates that Congress intended to limit whistleblower protection under Section 806 to only employees of publicly traded companies." (App. 154a). The First Circuit maintained that its narrow construction of section 1514A was supported by the report of the Senate Judiciary Committee and the remarks of the bill's sponsor, Senator Leahy. (App. 37a-39a). The ARB concluded that those very legislative materials instead supported the ARB's own broader interpretation of the law. (App. 154a-159a, 181a-184a). Similarly, the First Circuit reasoned that its decision to limit "employee" to employees of public companies was "strongly confirmed by ... the purpose of the legislation." (App. 16a). But the ARB insisted, to the contrary, that "[a]n interpretation limiting protection of whistleblowers to those only directly employed by a publicly traded company would sabotage the overriding purpose of protecting investors. (App. 160a-161a).

The First Circuit maintained that Congress never intended section 1514A(a) to prohibit retaliation against employees of the accounting firms or outside counsel who contract with public companies. (App. 23a-25a). The ARB insisted that it was precisely those outside professionals whom Congress sought to protect when it adopted section 1514A(a). (App. 158a, 158a-159a n.16). Both the First Circuit and the

ARB compared the wording of section 1514A(a) with the terms of other federal anti-retaliation provisions. The First Circuit insisted that comparison demonstrated that section 1514A(a) excludes employees of contractors and subcontractors (App. 28a-33a); the ARB concluded that the same comparison demonstrated the opposite. (App. 161a-165a).

This case presents precisely the situation in which review by this Court is warranted because of a conflict between the decision of a court of appeals and the authoritative construction of a statute issued by the administrative agency which administers that law. E. Gressman, K. Geller, S. Shapiro, T. Bishop and E. Hartnett, SUPREME COURT PRACTICE, p. 268 (9th ed. 2007). The ARB has made clear that it would apply *Spinner* rather than *Lawson* except in a case which arose in the First Circuit.[14] Thus administrative law judges in every state outside the First Circuit will be bound by *Spinner* in deciding section 1514A claims. Claimants in any of those other eleven geographical circuits can invoke the more favorable standard in the ARB *Spinner* decision by pursuing their claims in the administrative process, rather than by proceeding in district court, where the defendant could attempt to persuade a federal judge to follow the First Circuit decision in *Lawson* rather

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[14] App. 145a n.10 ("The case before us did not arise in the First Circuit, so we are not bound by *Lawson*.")

than the ARB decision in *Spinner*.[15] This will inevitably result in forum shopping until and unless this Court definitively resolves the meaning of section 1514A. An employer will as a practical matter be subject to different standards depending on where an employee worked or resided at the time of the alleged retaliation, a difference that is particularly problematic because many of the affected firms are national employers. In theory an employer may seek review of a final ARB decision in a court of appeals. However, an employer could do so only after the final resolution of the administrative process, which includes an investigation by OSHA, a period of discovery, an evidentiary hearing before an administrative law judge, and an appeal to (and possible remand from) the ARB, a lengthy process that can easily take four years or more when the claimant prevails.[16]

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[15] One prominent management side law firm noted that in the wake of *Spinner* "complainants can be expected to pursue their claims through the DOL's adjudicative regime, rather than remove them to federal courts ... in cases where coverage ... [is] questionable." http://www.seyfarth.com/publications/omm060612, visited June 12, 2012.

[16] *See, e.g., Ameristar v. Administrative Review Board*, 650 F.3d 562 (5th Cir. 2010) (seven years of administrative proceedings) (*see* Brief for Petitioners, 2010 WL 8019944); *R & B Transp., LLC v. United States Department of Labor*, 618 F.3d 37, 41 (1st Cir. 2010) (four years and 6 months of administrative proceedings); *Bechtel v. Secretary of Labor*, 50 F.3d 926, 930 (11th Cir. 1995) (seven years of administrative proceedings).

Spinner itself concerned a dismissal that occurred in 2008. (App. 138a). After almost four years of administrative proceedings,

(Continued on following page)

Concern that whistleblowers would be protected only in some parts of the country but not in others was one of the factors that induced Congress to enact section 1514A.[17] Today employees in the 46 states outside the First Circuit can utilize the administrative adjudicative process to invoke the protections of section 1514A that are denied to similar workers in the First Circuit. Without action by this Court, this conflict will continue until and unless *all* of the other geographical circuits have rejected the ARB decision in *Spinner* in favor of the rule in *Lawson*, an eventuality unlikely ever to occur.

III. THE FIRST CIRCUIT HAS DECIDED A QUESTION OF GREAT IMPORTANCE THAT SHOULD BE RESOLVED BY THIS COURT

This case presents a question of pivotal importance to the integrity of the securities markets

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the ARB in *Spinner* remanded the case to the ALJ for further proceedings. There still has not been an evidentiary hearing before an ALJ in that case.

[17] Corporate employees who report fraud are subject to the patchwork and vagaries of current state laws, although most publicly traded companies do business nationwide. Thus a whistleblowing employee in one state may be far more vulnerable to retaliation than a fellow employee in another state who takes the same actions. Unfortunately, ... efforts to quiet whistleblowers and retaliate against them for being "disloyal" or "litigation risks" transcend state lines.

(S.Rep. 107-146, p. 19).

and to the preservation of investor confidence. In the proceedings below the SEC and the Department of Labor emphatically cautioned the First Circuit that denying whistleblower protection under section 1514A to the hundreds of thousands of employees at issue would seriously interfere with efforts to prevent and correct violations of federal securities laws and rules. Despite the fully articulated concerns of the SEC, which has the critical responsibility of ending fraud and misrepresentation in the securities industry, a divided panel of the First Circuit carved into section 1514A precisely the massive loophole against which the government had warned. Under the First Circuit's decision, most investment fund advisers and most accounting firms are free to openly impose on their employees the very "code of silence" which the Senate committee warned "creates a climate where ongoing wrongdoing can occur with virtual impunity." (S.Rep. 107-146, p. 5). At a time when the nation's securities and financial markets remain in turmoil, and investor confidence is shaken on almost a daily basis, this dispute about the scope of section 1514A is a matter of the utmost importance that should be definitively resolved by this Court.

The SEC has made absolutely clear its belief that a broad interpretation of section 1514A is essential to the protection of investors.

> Were this court to limit the application of Section 806 to only employees of public companies, ... many ... professionals who are most likely to uncover evidence of federal

> securities law violations by the public companies they work with would be excluded from Section 806's whistleblower protections. Such a reading would impede the Commission's protection of investors as it would deter potential whistleblowers employed by privately-held agents or contractors from reporting possible securities violations by the public companies for whom they are performing work.

(Brief of the Securities and Exchange Commission as Amicus Curiae in Support of Plaintiff-Appellees, p. 1) (footnote omitted). The Department of Labor pointed out the same danger.

> The consequences of excluding the employees of contractors and subcontractors of public companies from section 806's protections would be dramatic.... The employees of a mutual fund's advisers ... would be unprotected by SOX's whistleblower provision, notwithstanding their knowledge of whether the funds they manage are complying with legal requirements designed to prevent SEC violations and shareholder fraud. Other categories of employees with specific knowledge of corporate activity, such as outside accountants and auditors, likewise would be unprotected. Such a result would be inconsistent with Congress' intent to provide whistleblower protection to those particularly well-positioned to blow the whistle on potential securities violations and shareholder fraud.

(Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellees, p. 22-24).

(1) The consequences of the First Circuit decision are particularly serious for the mutual fund industry. A mutual fund itself is a public company required to file reports with the SEC under section 15(d). However, as the court of appeals acknowledged, most mutual funds themselves have no employees. (App. 4a). Virtually all of the workers in the mutual fund industry are employed, not by the funds, but by investment advisers, and many of the advisers themselves are privately-held companies. Thus if, as the First Circuit held, section 1514A applies only to employees of public companies and not to privately-held firms (such as investment advisers) which contract with those companies, that anti-retaliation provision would not protect most of the employees in the mutual fund industry. In the case of Fidelity, which manages over $1.4 trillion in mutual fund assets and which employs approximately 39,000 individuals, there would not be a single worker who would be protected by section 1514A. The SEC expressly warned the First Circuit that limiting section 1514A to employees of public companies would have this drastic result.[18] In adopting its

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[18] [Limiting Section 806 to employees of public companies] would insulate from section 806 liability investment advisers and other private entities that employ nearly all of the persons who perform work for mutual funds, along with the professionals most likely to learn of possible material securities law

(Continued on following page)

narrow construction of section 1514A, the court of appeals emphatically embraced that very consequence of its decision.[19]

> violations by their publicly-traded clients. Although investment companies, including mutual funds, file reports under Section 15(d) of the Exchange Act, nearly all mutual funds are structured so as to have no employees of their own, and instead rely on non-publicly traded third-parties, principally privately-held investment advisers to function.... If this Court construes Section 806 as applying only to publicly-traded companies, it would place employees of investment advisers, an industry with nearly 157,000 employees that manage more than $12 trillion on behalf of investors, potentially outside the scope of SOX's whistleblower protections.

Brief of the Securities and Exchange Commission as Amicus Curiae in Support of Plaintiff-Appellees, pp. 20-21 (footnote omitted).

[19] Congress's primary concern in enacting SOX was not the activities of the advisers to mutual funds ... like the Fidelity funds here. Indeed, Congress knew that investment companies like the Fidelity mutual funds often do not have their own employees.... And if they have no employees, they are not subject to § 1514A.... Had Congress intended to extend § 1514A whistleblower coverage protections to the employees of private companies that have contracts to provide investment advice to [mutual] funds ... , it would have done so explicitly in § 1514A(a).

App. 26a-28a; *see* App. 36a ("Had Congress intended to ... cover the employees of private investment advisers for whistleblower protections, it would have done so explicitly in § 1514A(a). However, it did not.").

The SEC also warned the court below that limiting section 1514A to employees of public companies would effectively exclude from its protections employees of the outside accounting firms, like the now defunct Arthur Andersen, that audit the nation's public companies.

> [Restricting section 806 to employees of public companies] would ... leave unprotected professionals, such as outside accountants, auditors, and lawyers, who are most likely to uncover and comprehend evidence of potential violations. Regarding accountants and auditors, the so-called "Big-Four" firms are comprised of four private companies – PricewaterhouseCoopers, Ernst & Young, Deloitte & Touche and KPMG. The Big Four dominate the auditing industry with respect to public companies, auditing nearly 97 percent of "large accelerated filers" and 67 percent of "accelerated filers." If SOX's whistleblower provisions were held not to apply to private contractors, ... the employees of the Big Four, as well as other private accounting and auditing firms, would be virtually unprotected under Section 806.

(Brief of the Securities and Exchange Commission as Amicus Curiae in Support of Plaintiff-Appellees, pp. 22-23) (footnotes omitted). Because virtually all large public companies are audited by one of these privately-held accounting firms, denying whistleblower protection to all of their workers would permit these key accounting firms to suppress information that

may be of vital importance to ending unlawful practices.

Again, however, the court of appeals expressly endorsed that result of its decision, insisting that Congress did not want to extend whistleblower protection to the employees of accounting firms.[20] The First Circuit's conclusion is particularly surprising because the Senate report expressed specific concern that the Enron fraud had been facilitated when Arthur Andersen retaliated against an Andersen accountant who had questioned Enron's manipulative practices. (*See* p. 9, *supra*). As the SEC has observed, "[t]he legislative history discusses not only Congress' objective of protecting whistleblowing by employees of a public company, but also by employees of private firms that work with, or contract with, that issuer."[21]

> The legislative history of Sarbanes-Oxley would seem to confirm that Section 806 was meant to include an agent or contractor like

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[20] Congress's concern about Arthur Andersen was addressed by special provisions as to accountants.... The committee's concerns regarding the integrity and independence of accountants and auditors are addressed in SOX by virtue of these provisions and not by an expansive definition of "employee" in § 1514A(a).

(App. 40a).

[21] Brief of the Securities and Exchange Commission as Amicus Curiae, *Klopfenstein v. Administrative Review Board*, No. 10-60144 (5th Cir.), p.10.

> the accounting firm Arthur Andersen, not because there was any evidence that Andersen implemented Enron's personnel actions, but because Congress hoped an insider in an Arthur Andersen situation would blow the whistle on the type of fraud Arthur Andersen helped to conceal.

Walters v. Deutsche Bank AG, 2009 WL 6496755 at *7 (ALJ March 23, 2009).

Absent coverage by section 1514A, contractors could in a variety of ways suppress disclosure of misconduct that otherwise would fall within the scope of section 1514A(a). A mutual fund adviser could dismiss a worker for tipping off fund directors about fraudulent calculations by that investment adviser. An accounting firm could fire an employee for notifying a congressional committee about fraud by an audited firm, or for alerting the Office of the Comptroller of the Currency about malfeasance by a bank. These problems are not limited to suppression of information by mutual fund advisers and accounting firms. As the United States Chamber of Commerce advised the court below, "[p]ublicly held companies increasingly look to third party service providers, whether by way of outsourcing relationships or one-time engagements, to handle both core and non-core functions.... Many of these [are] private companies."[22]

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[22] Brief of *Amicus Curiae* Chamber of Commerce of the United States of America in Support of Appellants' Petition for Interlocutory Review, pp. 2-3.

(2) The First Circuit's crabbed interpretation of section 1514A seriously undermines several important regulatory schemes established by the SEC.

In April 2003, as provided by section 301 of Sarbanes-Oxley, the SEC issued a rule directing that the national securities exchanges and national securities associations compel every issuer to create an independent audit committee and to establish a procedure for "[t]he receipt, retention, and treatment of complaints received by the listed issuer regarding accounting, internal accounting controls, or auditing matters." 17 C.F.R. § 240.10A-3(b)(3)(i). The purpose of this complaint process requirement is to "facilitate disclosures, encourage proper individual conduct, and alert the audit committee to potential problems before they have serious consequences." 60 Fed.Reg. 18818, 18798 (April 16, 2003). The requirement "includes complaints received by a listed issuer regardless of source." *Id.* The SEC noted that such an audit committee would often need to rely on information from "outside auditors," and that "investment companies rarely have direct employees" and instead obtain most services from "employees of third parties, such as the investment adviser." *Id.* Obviously this SEC mandated complaint process could work as intended only if complainants who use that process were protected against retaliation for doing so. The SEC recognized that "[a] company employee *or other individual* may be reticent to report concerns regarding questionable accounting or other matters for fear of management reprisal," *id.*, (emphasis added),

noting that section 1514A provides protections for those "who provide evidence of fraud." *Id.* n.107. If section 1514A applies only to employees at public companies, *none* of the individuals who might complain to most SEC-mandated mutual fund audit committees (in this instance, none of the individuals who might complain to the Fidelity funds' audit committee) would be protected against reprisals.

In August 2003, pursuant to section 307 of Sarbanes-Oxley, the SEC issued a regulation requiring attorneys appearing and practicing before the Commission to report up the chain of command if they "become[ ] aware of evidence of a material violation [of federal or state securities law] by the issuer or by any officer, director, employee, or agent of the issuer." 17 C.F.R. § 205.3(b). The regulation does not compel attorneys to take affirmative steps to detect such violations; a covered attorney is required to act only if anyone else brings to his or her attention credible evidence of a violation. *See* 17 C.F.R. § 205.2(e). For that reason, this regulatory scheme could be seriously undermined if an employer were able to isolate attorneys from potentially inculpatory information by punishing any employee who provided such evidence to an attorney subject to the obligations of section 205.3(b). Under the First Circuit decision, the defendants are free to use such sanctions to deter employees from disclosing to Fidelity's attorneys information which Fidelity preferred that those attorneys not have.

In section 922 of the 2010 Dodd-Frank Act, Congress required the SEC to award to certain informants who provided to the SEC original information about securities law violations between 10 and 30 percent of any resulting penalty or disgorgement over $1 million collected by the government. 15 U.S.C. § 78u-6.[23] In its implementing regulations, the SEC deliberately created important incentives to encourage potential informants to utilize a company's internal compliance and reporting systems before contacting the Commission. 76 Fed.Reg. 34300, 34301 (June 13, 2011).[24] These provisions would apply to an employee of a privately held investment adviser who reported such violations to an internal compliance or reporting system established either by the adviser or by the mutual fund affected. But this system of incentives for internal reporting would be unlikely to succeed if a potential informant could be dismissed

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[23] The awards are not available to certain employees of accounting firms. *See* 17 C.F.R. § 240.21F-4(a)(4).

[24] A whistleblower's voluntary participation in an entity's internal compliance and reporting system is a factor that can increase the amount of the reward. 17 C.F.R. § 240.21F-6(a)(4). If such an internal report leads the entity itself to provide information to the SEC, the whistleblower will get credit – and potentially a greater reward – for any additional information generated by the entity in its own investigation. 17 C.F.R. § 240.21F-4(c)(3). In addition, an informant who initiates such an internal report is accorded additional time to thereafter report to the SEC, and is given the benefit of a 120 day "look back." 17 C.F.R. § 240.21F-4(b)(7).

for providing that information to either firm's internal compliance and reporting system.

More generally, applying section 1514A to internal complaints at mutual fund advisers, accounting firms, and other contractors protects the ability of those firms, and of the public companies with which they work, to detect and correct improper practices. As the United States Chambers of Commerce has pointed out,

> all stakeholders benefit when those with knowledge of potential securities law violations report internally.... With timely access to information about potential problems, companies can address and punish wrongdoing, avoid lawsuits, improve efficiency and reduce costs.... Internal reporting also complements the activities of the SEC and other government agencies by freeing them to focus their resources and energies on those companies that are unwilling or unable to take remedial action on their own.[25]

In the wake of the court of appeals' decision in the instant case, however, prudent employees will have good reason to avoid using a company's internal procedures to report potential illegality.

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[25] Letter of Lisa A. Rickard, President, U.S. Chamber Institute for Legal Reform, to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, Dec. 17, 2010, pp. 3-4, available at: http://www.sec.gov/comments/s7-33-10/s73310-194.pdf (visited June 20, 2012).

(3) The First Circuit's interpretation of section 1514A also threatens to undermine the operation of the Investment Company Act. Because a mutual fund is generally established by the very investment adviser that contracts to conduct a fund's actual operations, there is an inherent risk that the fund itself will acquiesce in excessive adviser fees. To prevent that abuse, the Investment Company Act requires that a mutual fund have a board of directors that is independent of the investment adviser and that can operate as an independent watchdog of the relationship between the fund and its adviser. "Under the Act, scrutiny of investment adviser compensation by a fully informed mutual fund board is the 'cornerstone of the ... effort to control conflicts of interest within mutual funds.' *Burks [v. Lasker*,] 441 U.S. [471,] 482 [(1979)]." *Jones v. Harris Associates L.P.*, 130 S.Ct. 1418, 1427-28 (2010). But a fund's directors cannot perform that essential function unless they have all relevant information. An investment adviser has a significant financial incentive to withhold information that might prompt the directors to question or reduce the fees the fund pays, and thus a similar incentive to muzzle employees who might alert fund directors to such information. That is precisely what Lawson alleges occurred in the instant case.

IV. THE QUESTION PRESENTED SHOULD BE RESOLVED BY THIS COURT WITHOUT FURTHER DELAY

The unique circumstances and unusual importance of this case warrant action by this Court

now to resolve the question that has divided the First Circuit and the ARB. The combined effect of these decisions has created the worst of both worlds: employees have good reason to fear that they do not enjoy the protection of the law if they engage in whistleblowing, and employers lack certainty as to when under federal law they can lawfully require workers to remain silent.

In the proceedings below both the SEC and the Department of Labor warned that a narrow interpretation of section 1514A would chill whistleblowing in the mutual fund industry and among the professionals who work with public companies. (*See* p. 23, *supra*). As the SEC admonished on another occasion, "limit[ing] the application of Section 806 only to employees of public companies.... would deter potential whistleblowers from coming forward."[26] Those well-founded admonitions reflect the unique nature of the nation's capital markets and of the securities industry. The leading firms all operate on a nationwide basis; Fidelity, for example, has 170 offices throughout the country. The stock-in-trade of the entire securities industry is information, which is constantly being generated, shared and analyzed by professionals in the field. In this environment, news of the First Circuit decision in *Lawson* spread rapidly throughout the industry. Scores of industry websites

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[26] Brief of the Securities and Exchange Commission as Amicus Curiae, *Klopfenstein v. Administrative Review Board*, No. 10-60144 (5th Cir.), p. 2.

and services warned employees, and heartened employers, with reports and analyses of the action of the court of appeals. Employees of investment advisers and professionals in the offices of major accounting firms throughout the country are assuredly all too well aware of *Lawson* and its implications.

The ARB decision in *Spinner* cannot undo the deterrent impact of *Lawson*. Workers of ordinary prudence are unlikely to risk their careers on a gamble that their employers will opt to follow the strictures of *Spinner* rather than exploit the loophole created by *Lawson*. The problem is particularly acute in the First Circuit, where employees of privately held investment advisers and accounting firms today have no hope of protection under Section 1514A.[27] *See* S.Rep. 107-146, p. 19 ("employers, with help from their lawyers, know exactly what they can do to a whistleblowing employee under the law"). Only a clear and certain guarantee of legal protection will overcome the "code of silence" which prompted Congress to enact section 1514A. Especially in these uncertain times, workers want jobs, not the prospect of extended litigation to thrash out whether future judges will find more persuasive the reasoning of the ARB or that of the First Circuit.

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[27] In addition to Fidelity, mutual funds headquartered in the First Circuit include Columbia Management ($167 billion in assets), John Hancock ($119 billion in assets), MFS Investment Management ($71 billion in assets), and Putnam Investments ($48 billion in assets).

Restoring an environment in which whistleblowing enjoys emphatically unequivocal protection is a matter of national importance. The types of financial misconduct at which section 1514A is directed "can leave thousands of victims robbed of their life savings." (S.Rep. 107-146, pp. 7-8). The cowed silence of a single mutual fund analyst or an accountant auditing a public company could result in the perpetuation of "fraud and other corporate crimes and misdeeds at the ultimate expense of the corporation's shareholders, creditors, and innocent employees.... Ultimately, our nation is the victim as the public loses confidence in the stock market." *SEC v. Gemstar-TV Guide Int'l*, 401 F.3d 1031, 1035-36 (9th Cir. 2005). In 2002 the Senate Judiciary Committee warned

> [t]hat it is likely that there are more "Enrons" lurking out there, simply eluding discovery. Future debacles wait to be discovered not only by investigators or the media, but by the more than one in two Americans who depend on the transparency and integrity of our public markets. The majority of Americans depend on capital markets to invest in the future needs of their families – from their children's college fund to their retirement nest eggs.

(S.Rep. 107-146, p. 11). Subsequent events have made painfully clear the accuracy of that prediction. Certiorari should be granted to end the uncertainty that now exists about the scope and vitality of the protection afforded by section 1514A, so that this critical provision of the Sarbanes-Oxley Act can, as Congress

intended, "play a crucial role in restoring trust in the financial markets by ensuring that corporate fraud and greed may be better detected, prevented and prosecuted." (S.Rep. 107-146, p. 2).

In light of the exceptionally thorough legal analysis in the First Circuit and ARB decisions, there is no reason to postpone resolution of this vital question merely to allow the issues to be further aired in the lower courts. These unusual opinions provide a more complete, carefully considered assessment of the question presented than is typically available to the Court from the appellate opinions giving rise to a circuit conflict, even when there is a larger number of such lower court decisions. The detail of the analysis and extensive research in the First Circuit and ARB decisions is exceptional. The four opinions total more than 30,000 words. Those opinions exhaustively parse the wording of section 1514A, canvas the relevant portions of the legislative history of the Sarbanes-Oxley Act, and carefully consider the significance of other federal whistleblower statutes. The ARB opinions add a detailed assessment of the Board's prior section 1514A decisions. All of the opinions draw on the SEC's assessment of the implications of this case for the financial markets and the Department of Labor's evaluation of the realities of the workplace. These opinions provide the Court with a uniquely thorough body of analysis, one which is unlikely to be enhanced if resolution of the question presented is postponed – at considerable risk to investors – to permit additional lower court consideration of the

materials already painstakingly presented and analyzed by the First Circuit and the ARB.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the First Circuit.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 10-2240

JACKIE HOSANG LAWSON; JONATHAN M. ZANG,

Plaintiffs, Appellees/Cross-Appellants,

v.

FMR LLC, f/k/a FMR Corp.; FMR CO., INC.; FMR CORP., d/b/a Fidelity Investments; FMR LLC, d/b/a Fidelity Investments; FIDELITY BROKERAGE SERVICES, LLC, d/b/a Fidelity Investments; FIDELITY MANAGEMENT & RESEARCH COMPANY,

Defendants, Appellants/Cross-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

(Hon. Douglas P. Woodlock, *U.S. District Judge*)

Before

Lynch, *Chief Judge*,
Howard and Thompson, *Circuit Judges*.

Paul E. Nemser, with whom Wilfred J. Benoit, Jr., Goodwin Proctor LLP, Eugene Scalia, Jennifer J. Schulp, and Gibson, Dunn & Crutcher LLP were on brief, for appellants/cross-appellees.

Robin S. Conrad, Shane B. Kawka, National Chamber Litigation Center, Inc., Willis J. Goldsmith, Wendy C. Butler, and Jones Day, on brief for Chamber of Commerce of the United States of America, amicus curiae.

Indira Talwani, with whom Segal Roitman, LLP, was on brief, for appellee/cross-appellant Jackie Hosang Lawson.

Jonathan M. Zang pro se.

Mary J. Rieser, Attorney, with whom M. Patricia Smith, Solicitor of Labor, Jennifer S. Brand, Associate Solicitor, and Jonathan T. Rees, Acting Counsel for Whistleblower Programs, were on brief, for the Secretary of Labor as amicus curiae.

Mark D. Cahn, General Counsel, Richard M. Humes, Associate General Counsel, and Thomas J. Karr, Assistant General Counsel, on brief for the Securities and Exchange Commission as amicus curiae.

February 3, 2012

LYNCH, *Chief Judge*. This interlocutory appeal is from the district court's order denying a Rule 12(b)(6) motion to dismiss two separate but related cases under the whistleblower protection provision of section 806 of the Sarbanes-Oxley Act of 2002 (SOX), codified at 18 U.S.C. § 1514A. *See Lawson v. FMR LLC,* 724 F. Supp. 2d 141 (D. Mass. 2010); Fed. R.

Civ. P. 12(b)(6). It raises important questions of first impression.

The plaintiffs, Jackie Hosang Lawson and Jonathan M. Zang, brought separate suits alleging unlawful retaliation by their corporate employers, which are private companies that act under contract as advisers to and managers of mutual funds organized under the Investment Company Act of 1940. Because the two suits shared a common defendant, FMR LLC, and both raised the same question of the scope of employees subject to protection under § 1514A, the district court addressed both cases in a single order. *Lawson,* 724 F. Supp. 2d at 144.

The district court concluded that the whistleblower protection provision within SOX section 806 extends its coverage beyond "employees" of "public" companies (as those terms are defined in the section) to encompass also the employees of private companies that are contractors or subcontractors to those public companies. *Id.* at 163. Concerned that this interpretation could be thought too broad, the district court then imposed a limitation, not found in the text, that the employees must be reporting violations "relating to fraud against shareholders." *Id.* 159-60. We interpret the statute differently and reverse.

I.

Background

Both plaintiffs are suing their former employers, which are private companies that provide advising or management services by contract to the Fidelity family of mutual funds.

The Fidelity mutual funds are not parties in either suit, and are investment companies organized under the Investment Company Act of 1940, 15 U.S.C. § 80a-3(a)(1). They are registered with the Securities and Exchange Commission (SEC) and are required to file reports under section 15(d) of the Securities Exchange Act of 1934 (1934 Act), 15 U.S.C. § 78o(d). The mutual funds are owned by their shareholders and are not owned or controlled by, or affiliated with, any of the defendant companies. The Fidelity funds are overseen by a single Fidelity Mutual Fund Board of Trustees; a super-majority of the Board's members are independent of the funds' advisers. As is not unusual among funds organized under the Investment Company Act, the Fidelity funds have no employees of their own.

Plaintiff Zang was employed by Fidelity Management & Research Co. and later by FMR Co., Inc., which was formed as a subsidiary of Fidelity Management & Research Co. (collectively, the Fidelity Management companies). The Fidelity Management companies have entered into contracts with certain of the Fidelity mutual funds to serve as investment advisers or sub-advisers. As investment advisers to

the funds, the Fidelity Management companies are subject to the provisions of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-1 *et seq.* The Fidelity Management companies are subsidiaries, directly or indirectly, of FMR LLC.

Zang's employment was terminated in July 2005. On September 15, 2005, he filed a complaint with the Occupational Health & Safety Administration (OSHA) of the Department of Labor (DOL), based on 18 U.S.C. § 1514A(b)(1)(A), which allows a person who alleges discharge or discrimination in violation of § 1514A(a) to seek relief by filing a complaint with the Secretary of Labor. The Secretary has, in turn, delegated enforcement responsibility for § 1514A to the Assistant Secretary for Occupational Safety and Health. *See* 67 Fed. Reg. 65,008, 65,008 (Oct. 22, 2002). Zang alleged that he had been terminated by the Fidelity Management companies in retaliation for raising concerns about inaccuracies in a draft revised registration statement for certain Fidelity funds. Zang alleged that he reasonably believed these inaccuracies violated several federal securities laws.

OSHA dismissed Zang's complaint, finding that he was a covered employee within the meaning of § 1514A(a), that is, he was an employee "covered" by the whistleblower protections, but that he had not engaged in conduct protected by that subsection. Zang objected and had a hearing before an Administrative Law Judge (ALJ). The Fidelity Management companies moved for summary decision, contending, among other things, that Zang was not a covered

employee. After allowing limited discovery on the issue, the ALJ granted summary decision for the Fidelity Management companies on that basis and dismissed. *Zang v. Fid. Mgmt. & Research Co.*, No. 2007-SOX-00027, 2008 WL 7835900 (Dep't of Labor ALJ Mar. 27, 2008).

Interpreting § 1514A(a), the ALJ concluded that merely being an employee of a privately held contractor to a fund was insufficient to come within the term "employee."[1]

Zang petitioned for review of the ALJ decision by the DOL's Administrative Review Board (ARB).[2] Zang

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[1] The ALJ also concluded that Zang would only be a covered employee if the private Fidelity Management companies acted on behalf of the public Fidelity funds as contractors or subcontractors "in employment matters . . when [they] terminated [Zang's] employment." *Zang v. Fid. Mgmt. & Research Co.*, No. 2007-SOX-00027, 2008 WL 7835900, at *14 (Dep't of Labor ALJ Mar. 27, 2008). The ALJ concluded that the funds had no role in the Fidelity Management companies' employment decisions and Zang had not sufficiently alleged that the private Fidelity Management companies had acted as the funds' "agent or contractor in regard to employment matters" and dismissed his complaint. *Id.* at *18. That issue is not before us.

Zang also argued before the ALJ that the private Fidelity Management companies and the public Fidelity funds should be considered a "single integrated enterprise" for the purpose of evaluating whether he was a covered employee under § 1514A(a). *Zang*, 2008 WL 7835900, at *15. The ALJ rejected this argument, *id.* at *18, and that issue is also not before us.

[2] The Secretary of Labor has delegated review of decisions by DOL ALJs to the DOL's ARB. *See* 67 Fed. Reg. 64,272, 64,272-73 (Oct. 17, 2002).

then gave notice to the DOL of his intention to file an action in federal court and filed his complaint against the Fidelity Management companies in the district court, terminating his appeal with the ARB. Under SOX, a claimant may seek de novo review in federal district court if the DOL has not issued a final decision on a complaint within 180 days of its filing.[3] 18 U.S.C. § 1514A(b)(1)(B).

Plaintiff Lawson was employed by Fidelity Brokerage Services, LLC, a private subsidiary of FMR Corp., which was succeeded by FMR LLC. Together these companies operate under the trade name Fidelity Investments. Lawson filed SOX complaints against her employer and its parent with OSHA pursuant to § 1514A(b)(1)(A) in 2006 while she was still employed. She alleged retaliation against her for raising concerns primarily relating to cost accounting methodologies. She resigned her employment in September 2007, claiming that she had been constructively discharged. One year after filing, Lawson notified OSHA that she intended to seek review of her SOX claim in federal court. Her claims, which had been consolidated, were closed by the DOL, and she

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[3] The district court determined that although there was an ALJ decision in Zang's case, because that decision was on review with the ARB, it was not final. *Lawson v. FMR LLC*, 724 F. Supp. 2d 141, 151 (D. Mass. 2010). And since more than 180 days had elapsed since his claim was filed with OSHA, his complaint was properly before the district court. *Id.* at 152. That portion of the district court's opinion is not an issue on appeal.

filed a complaint against her employers in the district court.

The defendants, all private companies, filed motions to dismiss under Rule 12(b)(6), arguing that the plaintiffs were not covered employees under § 1514A(a) and, in the alternative, that they had not engaged in protected activity under § 1514A(a)(1). The district court denied the motions to dismiss as to the plaintiffs' claims alleging retaliation in violation of § 1514A, which is the subject of this appeal.[4] *Lawson,* 724 F. Supp. 2d 141.

The district court held that the SOX whistleblower protection provisions of § 1514A(a) extend to employees of private agents, contractors, and subcontractors to public companies; that the plaintiffs had sufficiently pleaded facts alleging that their private company employers were "either contractors, subcontractors, or agents of publicly held investment companies;" and that both plaintiffs had sufficiently alleged that they had engaged in protected activity under § 1514A(a)(1). *Lawson,* 724 F. Supp. 2d at 163-65.

The defendants moved that the dispositive issue of § 1514A(a)'s applicability to the plaintiffs be certified for interlocutory appeal under 28 U.S.C.

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[4] The district court granted the motions to dismiss as to the plaintiffs' state law claims for wrongful discharge in violation of public policy. *Lawson,* 724 F. Supp. 2d at 167. The dismissal of those claims is not a subject of this appeal.

§ 1292(b). The district court granted the motion, certified a "controlling question of law" to this court, and stayed the cases before it. *Lawson v. FMR LLC,* 724 F. Supp. 2d. 167, 169 (D. Mass. 2010). The defendants petitioned this court for interlocutory review, and the plaintiffs each filed cross-petitions urging this court to grant the appeal. We granted the parties' cross-petitions for interlocutory review. *Lawson v. FMR LLC,* No. 10-1944 (1st Cir. Oct. 25, 2010).

II.

Statutory Construction

We limit our review of the district court's order to the question the court certified:

> Does the whistleblower protection afforded by Section 806(a) of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, apply to an employee of a contractor or subcontractor of a public company, when that employee reports activity which he or she reasonably believes may constitute a violation of 18 U.S.C. §§ 1341, 1343, 1344, or 1348; any rule or regulation of the Securities and Exchange Commission; or any provision of Federal law and such a violation would relate to fraud against shareholders of the public company?

Lawson, 724 F. Supp. 2d at 169; *see also* 28 U.S.C. § 1292(b).[5]

Our review is de novo, both because this is an appeal from a denial of a Rule 12(b)(6) motion and because the issue of statutory interpretation is one of law. *See U.S. ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377, 383 (1st Cir. 2011); *Carnero v. Bos. Scientific Corp.*, 433 F.3d 1, 4 (1st Cir. 2006).

A. Construction of the statute

1. Text of § 1514A(a)

This case turns on the interpretation of SOX's whistleblower protection provision, codified at 18 U.S.C. § 1514A. It "is a relatively small part of the Sarbanes-Oxley Act which is composed of many separate statutes and statutory schemes aimed at achieving the Act's investor-protection goals." *Carnero*, 433 F.3d at 5.

We start our analysis with the particular subsection at issue before considering other relevant text in

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[5] Although the Supreme Court has held that under 28 U.S.C. § 1292(b), "appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court," *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996), we need not exercise our power to go beyond the question certified, and do not do so here. *See* 16 Wright & Miller, *Federal Practice and Procedure* § 3929 (2d ed. 2011) ("Of course this power need not be exercised – ordinarily the question specified by the district court . . will be the focus of arguments on the merits.").

the statute, both in the section and elsewhere. Section 806 of SOX reads in pertinent part:

> SEC. 806. PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES WHO PROVIDE EVIDENCE OF FRAUD.
>
> (a) In General. – Chapter 73 of title 18, United States Code, is amended by inserting after section 1514 the following:
>
> "§ 1514A. Civil action to protect against retaliation in fraud cases
>
> "(a) Whistleblower protection for employees of publicly traded companies. – No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, *contractor, subcontractor,* or agent of such company, *may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee* in the terms and conditions of employment because of any lawful act done by *the employee* –
>
> "(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities or commodities fraud], any rule or regulation

> of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by –
>
> "(A) a Federal regulatory or law enforcement agency;
>
> "(B) any Member of Congress or any committee of Congress; or
>
> "(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
>
> "(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders."

Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806, 116 Stat. 745, 802-03 (emphasis added).[6] The

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[6] Section 1514A(a) has since been amended by Congress. This is the unamended text in force at all pertinent times here.

interpretation of the emphasized language in the text of subsection (a) is in dispute.

The parties agree only that this provision extends whistleblower protection to employees of "public companies" – that is, those with a class of securities registered under section 12 of the 1934 Act or those that file reports with the SEC pursuant to section 15(d) of the 1934 Act. While literally one of these two categories encompasses companies with publicly traded stock, we use the term "public companies" as a shorthand for both categories because companies required to file reports with the SEC pursuant to section 15(d), such as the Fidelity mutual funds, are "public" in the sense that they have issued securities that may be sold to the public and are required to make periodic reports to their investors. The question is whether Congress intended the whistleblower provisions of § 1514A also to apply to those who are employees of a contractor or subcontractor to a public company and who engage in protected activity.[7]

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[7] As the case comes to us, the plaintiffs' employers are not acting as agents for employment purposes of the Fidelity mutual funds, which are public companies but have no employees. Their employers' contracts with those funds are not for employment purposes.

Some opinions by the DOL ARB and by DOL ALJs have indicated that an employee of a non-public company may be able to proceed against his or her employer under § 1514A where such a non-public employer is a contractor, subcontractor, or agent to a public company for employment purposes – that is,

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No court of appeals has ruled on this issue.[8]

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where the non-public company retaliates against its own employee at the public company's behest. *See Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, No. 04-149, 2006 WL 3246904, at *10 (Dep't of Labor ARB May 31, 2006); *Zang*, 2008 WL 7835900, at *14; *but see Johnson v. Siemens Bldg. Techs., Inc.*, No. 08-032, 2011 WL 1247202, at *12 (Dep't of Labor ARB Mar. 31, 2011) (stating that *Klopfenstein* should be read as stating the broader proposition that a private company can be held liable under § 1514A where such private company would be considered a public company's agent under common law agency principles, not only when the private company is the public company's agent for employment purposes).

Again, neither plaintiff argues before us that we are faced with a situation where a private company acts as a contractor, subcontractor, or agent of a public company *for employment purposes* and retaliates against its own employee at the direction of the public company. We express no opinion on the scope of § 1514A(a)'s coverage in such a situation.

[8] In *Carnero v. Bos. Scientific Corp.*, 433 F.3d 1 (1st Cir. 2006), we held that § 1514A did not have extraterritorial effect. In order to reach the question of extraterritoriality, we "assume[d], for present purposes, but without deciding" that the plaintiff in that case was a covered employee of the public company Boston Scientific Corporation (BSC), even though he was employed by BSC's foreign subsidiaries. *Id.* at 6. However, we also stated that "[n]either party . . . contest[ed] that [the plaintiff] was a covered employee of BSC for purposes of seeking whistleblower relief under" SOX; instead they focused all of their arguments on the extraterritorial reach of section 806. *Id.* The issue of whether § 1514A(a) covers employees of companies which are under contract to public companies was not presented to us in *Carnero*.

The only other reported district court opinion addressing this question rejected the argument accepted by the district court here. In *Brady v. Calyon Sec. (USA)*, 406 F. Supp. 2d 307 (S.D.N.Y. 2005), the court concluded that the reference to "any

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The defendants argue that § 1514A(a) provides that no public company – or any officer, employee, contractor, subcontractor, or agent of that company – may discriminate against an employee *of such public company* for engaging in protected whistleblowing activity. The defendants read the listing of "officer, employee, contractor, subcontractor, or agent" in § 1514A(a) as identifying who is barred from taking retaliatory action against the employees of public companies, but not as extending coverage to those enumerated entities' own employees.

The plaintiffs contend that the covered "employee" who is given whistleblower protection includes both the employees of public companies *and* those who are the employees of those public companies' officers, employees, contractors, subcontractors, or agents.

While different readings may be given the term "employee" within the emphasized language of the text of § 1514A(a) itself as to whether the protected employee refers only to employees of the public

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officer, employee, contractor, subcontractor, or agent of such company" in § 1514A(a) "simply lists the various potential actors who are prohibited from engaging in discrimination on behalf of a covered employer." *Id.* (quoting *Minkina v. Affiliated Physicians Grp.*, No. 2005-SOX-00019, 2005 WL 4889024, at *5 (Dep't of Labor ALJ Feb. 22, 2005)) (internal quotation marks omitted).

Two unreported district court cases have also addressed the question. *See Ervin v. Nashville Peace & Justice Ctr.*, No. 07-0832, 2008 WL 4449920, at *7 (M.D. Tenn. Sept. 29, 2008); *Rao v. Daimler Chrysler Corp.*, No. 06-13723, 2007 WL 1424220, at *3 (E.D. Mich. May 14, 2007).

companies, principles of statutory interpretation lead us to interpret § 1514A(a) in favor of such a limitation. The title of section 806 and the caption of § 1514A(a) are statements of congressional intent which go against plaintiffs' interpretation. Other provisions of SOX also support and are more consistent with the defendants' reading and inconsistent with the plaintiffs' reading. Our reading of "employee" as excluding from coverage employees of officers, employees, contractors, subcontractors, and agents of public companies is also strongly confirmed by the pre-passage legislative history of this section and other sections of SOX and the purpose of the legislation. Further confirmation is provided by the later actions of Congress in rejecting a bill meant to amend SOX and in congressional acceptance of other amendments.

That the immediate text within § 1514A(a) may be read differently as to the scope of the protected "employees" as a matter of grammar needs little discussion. In our view, the more natural reading is the one advanced by the defendants. Each side has an argument that had Congress just added a few words, its intent would have been clearer,[9] and none of these

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[9] For instance, Congress could have more clearly enacted defendants' interpretation of § 1514A(a) by extending the provision's coverage only to "an employee *of such company.*" Or Congress could have clearly enacted the plaintiffs' interpretation by defining "employee" or explicitly adding coverage of employees of advisers to investment companies organized under the Investment Company Act of 1940.

arguments resolve the case. That intent does become clearer if one looks beyond the immediate phrases in subsection (a). Both circuit precedent and Supreme Court precedent require that we examine the broader statutory framework, including particularly the nearby language, *Comm'r v. Lundy*, 516 U.S. 235, 250 (1996); *United States v. Ozuna-Cabrera*, 663 F.3d 496, 499 (1st Cir. 2011), and the title and caption, *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 529 (1947); *Berniger v. Meadow Green-Wildcat Corp.*, 945 F.2d 4, 9 (1st Cir. 1991).

We conclude that only the employees of the defined public companies are covered by these whistleblower provisions; the clause "officer, employee, contractor, subcontractor, or agent of such company" goes to who is prohibited from retaliating or discriminating, not to who is a covered employee and so does not violate the rule against rendering superfluous any statutory language. The text of § 1514A(a) first identifies covered employers: those with a class of securities registered under section 12 of the 1934 Act or those that file reports with the SEC pursuant to section 15(d) of the 1934 Act. Such public companies may not retaliate[10] against their own employees who engage in protected activity. Section 1514A(a) then enumerates a list of representatives of such employers,

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[10] We use the term "retaliate" to cover "discharge, demote, suspend, threaten, harass, or in any other manner discriminate . . . in the terms and conditions of employment." 18 U.S.C. § 1514A(a).

including those who are contractors or subcontractors, and they are also barred from retaliating against employees of the covered public-company employer who engage in protected activity.

The plaintiffs and their amici argue that, because § 1514A(a) forbids retaliation *by* "any officer, employee, contractor, subcontractor, or agent" of a public company, that provision must forbid retaliation *against* an employee of a contractor, subcontractor, or agent to a public company. But plaintiff Lawson and plaintiffs' amici also reject the district court's limiting principle for their broad reading. As a matter of logic, the conclusion does not follow from its premise. As a matter of language, the argument ignores its implication: if an employee of "any" contractor, subcontractor, or agent is protected, Congress must, by the same reasoning, have intended to protect the employee of "any" officer or employee of a public company. This argument both creates anomalies and provides very broad coverage.

Section 1514A(a)'s list of company representatives serves, instead, to ensure an employee of a public company is covered under the provision if he or she were harassed by officers, other employees, or contractors or subcontractors to the public company for reporting fraud in that public company.[11]

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[11] As said, our interpretation does not render the listing clause superfluous but gives it meaning.

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2. The title of section 806 and the caption of § 1514A(a)

Both the title of SOX section 806, within which § 1514A(a) is housed, and the caption of § 1514A(a) itself are explicit guides to the limits on the meaning of the textual phrase within § 1514A(a). Section 806 states it concerns "Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud." From that alone, it would be odd to read § 1514A(a) as covering employees of private companies. It is unlikely Congress intended the term "Civil action to protect against retaliation in fraud cases" in the heading of § 1514A to be broader than the terms of the "Protection" discussed in the title of section 806.

One of our sister circuits has, in addition, hypothesized a particular fact situation. In *Fleszar v. U.S. Dep't of Labor,* 598 F.3d 912 (7th Cir. 2010), *cert. denied,* 131 S. Ct. 423 (2010), Judge Easterbrook observed, in dicta, that "[t]he idea behind" the provision listing contractors, subcontractors, and agents in § 1514A(a) as entities *by* whom retaliation cannot take place "is that a covered firm, such as IBM, can't retaliate against whistleblowers by contracting with an ax-wielding specialist (such as the character George Clooney played in 'Up in the Air')." *Id.* at 915; *see also Kalkunte v. DVI Fin. Servs., Inc.,* No. 2004-SOX-00056, 2005 WL 4889006 (Dep't of Labor ALJ July 18, 2005), *aff'd,* Nos. 05-139, 05-140, 2009 WL 564738 (Dep't of Labor ARB Feb. 27, 2009) (holding that the complaining employee of a public company could bring a § 1514A action against such company's private contractor where the contractor managed the public company's operations and retaliated against the complainant). We merely note this and have no need to comment further.

Congress did not rest there. It repeated the limitation "Whistleblower protection for employees of publicly traded companies" in the caption in the first line of the text of subpart (a) of § 1514A. This double limitation strongly works against plaintiffs' interpretation.

Supreme Court, as well as circuit, law requires that we consider the title and the caption of the section under which the language appears. *See Bhd. of R.R. Trainmen,* 331 U.S. at 529; *Ozuna-Cabrera,* 663 F.3d at 499 n.3; *Berniger,* 945 F.2d at 9. It is certainly true that "the title of a statute and the heading of a section cannot limit the plain meaning of the text." *Bhd. of R.R. Trainmen,* 331 U.S. at 528-29. This is not our issue: the caption of § 1514A(a) does not in any way contradict the plain text, but sheds light on the meaning of the text. The Supreme Court has been clear that titles and captions should be used "[f]or interpretive purposes . . . when they shed light on some ambiguous word or phrase." *Id.* at 529; *see also Berniger,* 945 F.2d at 9 ("It is well established that a statute's title may aid in construing any ambiguities in a statute."). The title and the caption each contain the phrase, "employees of publicly traded companies," which supports the reading that the use of the term "employees" underneath refers to "employees of publicly traded companies."

The Supreme Court has addressed a case presenting a similar question to the one here. *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.* (*NCIR*), 502 U.S. 183 (1991). At issue was a regulation entitled

"Condition against unauthorized employment," the text of which referred to "[a] condition barring employment." 8 C.F.R. § 103.6(a)(2)(ii) (1991). The parties disagreed whether the word "employment" in the text referred to employment generally or more narrowly to unauthorized employment. *NCIR*, 502 U.S. at 189. The Court ruled that "[t]he text's generic reference to 'employment' should be read as a reference to the '*unauthorized* employment' identified in the paragraph's title." *Id.* We follow the same reasoning as to § 1514A(a): the "generic reference" to "employee" in the text "should be read as a reference to" the "employees of publicly traded companies" identified in that subsection's caption.[12]

Plaintiffs' fallback is to their argument that the title and the caption do not mean what they say. Just as the term "publicly traded companies" is a shorthand for the two categories of covered companies,

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[12] Our reading is entirely consistent with the principles of construction applied and the result reached in *United States v. Ozuna-Cabrera*, 663 F.3d 496 (1st Cir. 2011). There we rejected an argument that the text "without lawful authority" in 18 U.S.C. § 1028A(a)(1) was equivalent to "without authorized permission" and that the defendant's construction was somehow supported by the statute's title: "Aggravated identity theft." In *Ozuna-Cabrera*, the title was entirely consistent with our rejection of the defendant's more defendant-friendly construction. In this case, the title and caption are even clearer in support of our reading. Further, the text we considered in *Ozuna-Cabrera* provided no ambiguity which would have warranted resort to the rule of lenity, which is used only in criminal cases.

plaintiffs argue that the title and caption are no more than a second shorthand meant to include all employees possibly covered in the text. That is not the proper reading, and is contradicted by the plain words of the title of section 806 and the caption of § 1514A(a). The title and caption are not ambiguous and their purpose in being there was not to add to any ambiguity in the text but to clarify. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2336 (2008) (relying on subchapter's title – "Postconfirmation matters" – to undermine respondent's argument that a statute within that subchapter covered preconfirmation transfers); *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (title of amendment, reinforced by its legislative history, clarified amendment's meaning). We do not think there is any ambiguity left. But if there were, other rules of statutory interpretation would lead us to the same result.

3. Other textual provisions of SOX

The choice by Congress to provide limited coverage in § 1514A(a) was not inadvertent, as shown by its choices elsewhere in SOX. Other provisions of SOX as of the time of enactment reinforce our view of the meaning of § 1514A(a) in several respects. Congress enacted only limited whistleblower protection in § 1514A(a). Where it wished to enact broader whistleblower protection elsewhere, it explicitly did so. But it chose different, more limited language for the

coverage provision of § 1514A(a) than when it intended expanded coverage.

Congress also was explicit elsewhere than in its choice of language in § 1514A(a); where it intended to regulate non-public entities, it did not use language equivalent to the text of § 1514A(a). It is also clear that Congress made choices about different regulatory mechanisms for different entities, and intended the coverage of § 1514A(a), which creates a private right of action, not to be so broad as to include employees of non-public companies. For example, it subjected accountants and lawyers to different regulatory mechanisms.

First, when Congress intended to enact broader whistleblower protection in SOX itself in sections other than § 1514A, it did so clearly. In *Carnero,* we described section 1107 of SOX as "[t]he other whistleblower provision found in [SOX]." 433 F.3d at 10; *see also Glynn v. EDO Corp.,* 536 F. Supp. 2d 595, 616 (D. Md. 2008) (describing section 1107 as serving to "deter[ ] retaliation against whistleblowers"). Section 1107 is entitled "Retaliation Against Informants" and adds this language to 18 U.S.C. § 1513:

> (e) *Whoever* knowingly, with the intent to retaliate, *takes any action harmful to any person, including interference with the lawful employment or livelihood of any person,* for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal

> offense, shall be fined under this title or imprisoned not more than 10 years, or both.

SOX § 1107, 116 Stat. at 810 (emphasis added). This language requires neither a public company, nor an employment relationship, nor a securities law violation to trigger coverage. The scope of § 1514A(a) is, by contrast, conspicuously narrow. *See Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002) ("[W]hen 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

Second, in other portions of SOX, where Congress intended separate provisions of the Act to apply to employees of private entities, it said so explicitly. By contrast, the title of section 806 and the caption of § 1514A(a) explicitly refer to publicly traded companies. SOX contains a number of provisions, described below, which directly and explicitly regulate the activities of entities other than publicly traded companies. Further, Congress expressly set up different regulatory schemes, which varied with the persons or entities involved. For example, Title I of SOX establishes the Public Company Accounting Oversight Board, which regulates "public accounting firms that prepare audit reports for issuers, brokers, and dealers." 15 U.S.C. § 7211(c)(1); *see also id.* §§ 7211-7220. Title II ensures the independence of outside auditors. *See id.* §§ 7231-7234.

In another example, section 307 of SOX directs the SEC to issue rules governing the professional conduct of attorneys – both in-house and outside counsel – who appear before it in the representation of issuers. *See id.* § 7245. Moreover, Title VI, "Commission Resources and Authority," details the SEC's authority to censure or bar outside securities professionals from practice and defines conditions under which a person can be barred from practicing as a broker, investment adviser, or dealer. *See id.* §§ 78d-3, 78o, 80b-3.

Further, Title V, "Analyst Conflicts of Interest," defines codes of conduct for outside securities analysts and requires disclosures of conflicts of interest. *See id.* § 78o-6. And Title VII, "Studies and Reports," requires the Comptroller General and the SEC to perform various studies, including on securities violations by securities professionals, defined as "public accountants, public accounting firms, investment bankers, investment advisers, brokers, dealers, attorneys, and other securities professionals practicing before the Commission." SOX § 703(a)(1), 116 Stat. at 798.

Congress has been clear in SOX when it intends to regulate private entities and has been explicit. By contrast, the limited language within the text of § 1514A(a) and the title and caption show that Congress did not intend coverage to reach beyond employees of public companies. The Supreme Court has directed us to be particularly attentive to such language choices in interpreting the securities laws. *See*

Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 176 (1994) (refusing to impose aiding and abetting liability under § 10(b) of the 1934 Act because "Congress knew how to impose aiding and abetting liability when it chose to do so"); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734 (1975) (limiting Rule 10b-5 cause of action to actual purchasers and sellers of securities in part because "[w]hen Congress wished to provide a remedy to those who neither purchase nor sell securities, it had little trouble in doing so expressly"); *SEC v. Tambone*, 597 F.3d 436, 444-45 (1st Cir. 2010) (en banc) (court must honor the differential draftsmanship of Congress).

Plaintiffs argue that surely Congress meant to cover all whistleblowers and their reading is required by Congress's purpose. Not so. These distinctions and differentiated approaches to multi-faceted problems drawn by Congress, including the coverage limitation in § 1514A(a) to public companies, are consistent with the problems which led to the enactment of SOX. Congress's primary concern in enacting SOX was not the activities of the advisers to mutual funds organized under the Investment Company Act, like the Fidelity funds here. Indeed, Congress knew that investment companies like the Fidelity mutual funds often do not have their own employees, but only a Board of Trustees, and are often advised and managed by private entities, like the defendants. *See Jones v. Harris Assocs. L.P.*, 130 S. Ct. 1418, 1422 (2010) ("A separate entity called an investment

adviser creates the mutual fund, which may have no employees of its own."); *Burks v. Lasker*, 441 U.S. 471, 480-81 (1979); S. Rep. No. 91-184, at 4 (1969) (accompanying the Investment Company Amendments Act of 1970) ("Mutual funds, with rare exception, are not operated by their own employees. Most funds are formed, sold, and managed by external organizations, [called 'investment advisers,'] that are separately owned and operated."). And if they have no employees, they are not subject to § 1514A. This is not anomalous. Congress in the Investment Company Act deliberately created this separation between investment companies and their advisers.[13] *See* 15 U.S.C. § 80a-1(b)(2) (declaring as a policy rationale for the Investment Company Act the prevention of conflicts of interest between investment companies and advisers).

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[13] Investment advisers and their employees are regulated by the securities laws, and they may be prosecuted for violations of these laws. *See* 15 U.S.C. § 80b-6 (making it unlawful for investment advisers to, among other things, defraud their clients or prospective clients). In fact, the SEC's study of violations of securities laws by securities professionals required by SOX section 703 demonstrates that the SEC has been active in prosecuting violations of securities laws by investment advisers. *See* SEC, Study and Report on Violations by Securities Professionals 6 (2003), *available at* http://www.sec.gov/news/studies/sox703 report.pdf/ (finding that in SEC actions that reached finality between January 1, 1998, and December 31, 2001, 264 investment advisers or persons associated with investment advisers had been found to have violated securities laws).

Had Congress intended to extend § 1514A whistleblower coverage protections to the employees of private companies that have contracts to provide investment advice to funds organized under the Investment Company Act, it would have done so explicitly in § 1514A(a) not only in the text of § 1514A(a), but also in the title and caption under which the text is found. Elsewhere in SOX, Congress did specifically address investment companies and investment advisers, and made it explicit when it intended coverage and when it did not. *See, e.g.*, 15 U.S.C. § 7263 (exempting "investment compan[ies] registered under" section 8 of the Investment Company Act from certain SOX provisions); *id.* § 80b-3(e) (titled "Investment Advisers" and amending the Investment Advisers Act).

The broader reading of § 1514A(a) offered by plaintiffs would provide an impermissible end run around Congress's choice to limit whistleblower protection in that subsection to the employees of two categories of companies the title and caption call "publicly traded companies."

4. SOX's reference to the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century

The whistleblower protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121, was a model for at least portions of the whistleblower

protection provision of § 1514A, which incorporates the procedures and burden-shifting framework of AIR 21. *See* 18 U.S.C. § 1514A(b)(2)(A) ("An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code."); *id.* § 1514A(b)(2)(C) ("An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.").

The legislative history of SOX also refers to AIR 21. *See* S. Rep. No. 107-146, at 30 (2002) (additional views of Sen. Hatch, et al.) (stating that an amendment to the bill containing eventual § 1514A made that provision "consistent with [AIR 21] in which we provided whistleblower protections to another class of non-government employees[;] . . . we thought it best to track those protections as closely as possible"). The tracking of these protections operates against plaintiffs' interpretation.

The pertinent section of AIR 21 is entitled "Protection of employees providing air safety information" and states that "[n]o air carrier or *contractor* or *subcontractor* of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request

of the employee)" engaged in protected whistleblowing activity. 49 U.S.C. § 42121(a) (emphasis added).[14]

There are several important differences between the whistleblower provision of AIR 21 and that of SOX, which operate against plaintiffs' interpretation. The text of AIR 21 has greater clarity. Further, AIR 21 contains an inherent, textual limiting principle. It does not extend broadly to any contractor or subcontractor, instead § 42121 defines "contractor" to mean "a company that performs safety-sensitive functions by contract for an air carrier." *Id.* § 42121(e). This limitation on the term "contractor" excludes from coverage employees of all other contractors and subcontractors.

By contrast, plaintiffs' broader and unlimited construction of "employee" in § 1514A(a) would provide protection to employees of *any* contractor or subcontractor. It is true that AIR 21 explicitly went beyond employees of airlines, but only to employees of a limited class of contractors and subcontractors: those who perform "safety-sensitive functions." That limited expansion serves AIR 21's purpose of protecting the safety of travelers by focusing on those contractors and subcontractors responsible for safety. No such limitation is built into SOX or into plaintiffs'

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[14] *See* S. Rep. No. 105-278, at 22 (1998) (stating that the whistleblower protection of AIR 21 "would provide employees of airlines, and employees of airline contractors and subcontractors, with statutory whistleblower protection").

expansive reading. Defendants' reading, by contrast, is self-limited.

Second, the text of AIR 21 does not pose the interpretative problems posed by plaintiffs' proposed construction of § 1514A(a): excessive breadth and the extension of coverage to employees of employees and employees of officers. In § 1514A(a), Congress chose to employ different language from what it used in § 42121(a), undercutting plaintiffs' argument that because AIR 21 purportedly covers employees of contractors, so should § 1514A.

Further, in AIR 21, Congress did not consider the subject matter of the complaints – air safety information – to be an adequate limitation on the creation of whistleblower liability in the air carrier business, so it limited the definition of the relevant contractors. Congress did not in SOX consider the subject matter of the complaints to be the only limiting principle, nor to be sufficient in itself to narrow the range of contractors. The plaintiffs' reading is broader than Congress's intended reach.[15]

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[15] Because we conclude that the text of § 1514A(a) is unambiguous in limiting whistleblower protection to employees of public companies and reverse the district court, we do not reach a conclusion on the district court's proposed limiting principle. The district court stated that the phrase "relating to fraud against shareholders" in § 1514A(a)(1) modifies the entire clause "a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law". *See Lawson*, 724 F. Supp. 2d at

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5. Contrast with language of other whistleblower protection statutes

Our reading of § 1514A(a) stands on the text of SOX itself. If more were needed, we also find support in the contrast with whistleblower provisions in other statutes. In contrast with the language of § 1514A(a), we note two other, earlier, federal whistleblower protection statutes which explicitly extend coverage to employees of contractors to the entities regulated by those statutes. That Congress was clear in extending coverage to employees of contractors in those statutes confirms our understanding of § 1514A(a) as not extending so far.

The Nuclear Whistleblower Protection provision of the Energy Reorganization Act, 42 U.S.C. § 5851(a)(1), states that "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)" engaged in protected whistleblowing activity. The provision defines "employer" as, among other things, "a licensee of the [Nuclear Regulatory] Commission or of an agreement State under" the Atomic Energy Act of 1954, *id.* § 5851(a)(2)(A), "a contractor or subcontractor of such a licensee or applicant" for a license, *id.* § 5851(a)(2)(C), and "a

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159-60. That proposed limiting principle addresses the scope of protected activity, not the scope of employee coverage.

contractor or subcontractor of the Commission," *id.* § 5851(a)(2)(E).

Similarly, the whistleblower protection provision of the Pipeline Safety Improvement Act of 2002, 49 U.S.C. § 60129(a)(1), states that "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)" engaged in protected whistleblowing activity. That statute goes on to define "employer" as "a person owning or operating a pipeline facility," *id.* § 60129(a)(2)(A), or "a contractor or subcontractor of such a person," *id.* § 60129(a)(2)(B).

The whistleblower protection provisions of both the Energy Reorganization Act and the Pipeline Safety Improvement Act are explicit in defining which entities and which of those entities' representatives are covered employers. We view the fact that Congress was not similarly explicit in extending coverage to the employees of contractors, subcontractors, and agents in § 1514A(a) as evidence that Congress did not intend such coverage to exist.

6. Other canons of construction

Our reading of § 1514A is further confirmed by canons of construction mandated by Supreme Court opinions regarding both securities laws and the relationship between investment companies and their advisers.

The Court has admonished the lower federal courts not to give securities laws a scope greater than that allowed by their text. *See, e.g., Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 772 (2008) ("[T]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation." (quoting *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17 (1951))); *Pinter v. Dahl*, 486 U.S. 622, 653 (1988) ("The ascertainment of congressional intent with respect to the scope of liability created by a particular section of the Securities Act must rest primarily on the language of that section."). While many of these cases are in the context of the implied private right of action under § 10(b) of the 1934 Act, the rule that we are to "assume that Congress meant what it said" when it enacts legislation applies throughout the Code, including SOX. *Pinter*, 486 U.S. at 653.

Plaintiffs incorrectly argue that since the statute has some remedial purposes, those purposes must be as broad as plaintiffs say, and it must be assumed Congress chose the mechanism of a broad private right of action rather than other mechanisms to effectuate remedies. Plaintiffs essentially argue that the actual text must give way in favor of a broader reading to effectuate those broad remedial purposes. That is not the law. While the Court has stated that "securities laws combating fraud should be construed 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes,'" *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386-87 (1983)

(quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963)), it has also admonished that "[t]he broad remedial goals of [a securities law] are insufficient justification for interpreting a specific provision 'more broadly than its language and the statutory scheme reasonably permit.'" *Pinter*, 486 U.S. at 653 (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979)). Here, plaintiffs' reading is broader than the statutory scheme permits. Further, as discussed later, plaintiffs' interpretation goes far beyond the problems Congress wished to remedy.

In *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), the Court held that the fact that an investment adviser to a mutual fund exercised significant influence over its client fund and prepared SEC prospectuses on behalf of the fund did not make the adviser subject to liability under SEC Rule 10b-5 for statements made in those prospectuses, despite the adviser's "uniquely close" relationship with the fund. The Court stated that the mutual fund (an investment company under the Investment Company Act of 1940) and the adviser (an investment adviser under the Investment Adviser Act of 1940) were "legally separate entities" and that "[a]ny reapportionment of liability in the securities industry in light of the close relationship between investment advisers and mutual funds is properly the responsibility of Congress and not the courts." *Id.* at 2304.

Although there is a close relationship between the private investment adviser defendants and their client mutual funds, as pointed out by the plaintiffs

and the SEC as amicus curiae, the two entities are separate because Congress wanted it that way. Had Congress intended to ignore that separation and cover the employees of private investment advisers for whistleblower protections, it would have done so explicitly in § 1514A(a). However, it did not.

Finally, the rule of lenity has no place in our interpretation of § 1514A(a), for several reasons. Application of the rule of lenity is restricted to the interpretation of criminal statutes. *Bifulco v. United States,* 447 U.S. 381, 387 (1980) (The rule of lenity "applies . . . to interpretations of the substantive ambit of criminal prohibitions [and] . . . to the penalties they impose."). Section 1514A is not a criminal provision and imposes no criminal penalties; instead it provides for compensatory civil damages. 18 U.S.C. § 1514A(c). In addition to the inapplicability of the rule of lenity vel non, it would not apply here in any event because there is simply the lack of "grievous ambiguity" left after considering the text, structure, history, and purpose needed to invoke the rule. As the Supreme Court has recognized, "the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended."[16] *Barber v. Thomas,* 130 S. Ct. 2499, 2508-09

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[16] Furthermore, interpretative principles applied to immigration cases have no application here. *Cf. INS v. St. Cyr,* 533 U.S. 289, 320 (2001) (reciting "the longstanding principle of

(Continued on following page)

(2010) (citation omitted) (quoting *Muscarello v. United States*, 524 U.S. 125, 139 (1998), and *Bifulco*, 447 U.S. at 387) (internal quotation marks omitted) (quoted in *United States v. Gerhard*, 615 F.3d 7, 22 (1st Cir. 2010)).

B. Legislative history

Turning from the statutory language and principles of statutory interpretation which alone require us to reject plaintiffs' interpretation, we also confirm our understanding of the text by examining the legislative history. *See Samantar v. Yousuf*, 130 S. Ct. 2278, 2287 & n.9 (2010) (using legislative history to confirm the Court's sense of a statute's plain meaning); *Phillips v. Pembroke Real Estate, Inc.* 459 F.3d 128, 143 n.12 (1st Cir. 2006).

1. Contemporaneous legislative history

The contemporaneous legislative history consists of a May 6, 2002, Senate committee report for a bill containing what became § 1514A and statements in

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construing any lingering ambiguities in deportation statutes in favor of the alien" (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)) (internal quotation marks omitted)); *INS v. Errico*, 385 U.S. 214, 225 (1966) (stating that the Court resolved doubt in the interpretation of an immigration statute in favor of the alien "because deportation is a drastic measure and at times the equivalent of banishment or exile" (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948))).

the Congressional Record by Senator Leahy, a sponsor of that bill. We address each in turn.

The Corporate and Criminal Fraud Accountability Act of 2002, S. 2010, 107th Cong. (2002), was incorporated into SOX as Title VIII and contained the provision that would become § 1514A. The report of the Senate Judiciary Committee accompanying the Corporate and Criminal Fraud Accountability Act makes clear that Congress's primary concern was the Enron debacle, which involved the stock of a highly visible publicly traded company. *See* S. Rep. No. 107-146, at 2-5 (2002) (discussing Enron's collapse, its aftermath, and the need for reform).

The same committee report states that what became § 1514A "would provide whistleblower protection to employees of publicly traded companies," *id.* at 13, and that eventual § 1514A was intended to "provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company," *id.* at 18-19. These statements and others in the report accord with our interpretation. Only employees of publicly traded companies are mentioned; employees of private companies are not.

Senator Leahy stated that the provision that would eventually be codified as § 1514A "would provide whistleblower protection to employees of publicly traded companies who report acts of fraud," 148 Cong. Rec. S1787 (daily ed. Mar. 12, 2002)

(pre-enactment statement), and that "[a]lthough current law protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for employees of publicly traded companies who blow the whistle on fraud and protect investors," *id.* at S1788;[17] *see also* 149 Cong. Rec. S1725 (daily ed. Jan. 29, 2003) (statement of Sen. Leahy) (post-enactment) (§ 1514A "was intentionally written to sweep broadly, protecting any employee of a *publicly traded company* who took such reasonable action to try to protect investors and the market").

Plaintiffs point to the committee report's background discussion as supporting their position. The report decries retaliation against whistleblowers at Enron, a publicly traded company. *See* S. Rep. 107-146 at 4-5. But the report also discusses retaliation against employees at Arthur Andersen, a private entity which was both a consultant to Enron and its "independent" auditor. *See id.* at 3. The report states that "[i]n a variety of instances . . . corporate employees

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[17] In the same remarks, Senator Leahy stated more broadly that "[o]ur laws need to encourage and protect those who report fraudulent activity that damages investors in publicly traded companies." 148 Cong. Rec. S1788 (daily ed. Mar. 12, 2002). Plaintiffs contend that this statement supports a broad reading of the statute: if the point of § 1514A is to protect investors in publicly traded companies, then it makes sense that the statute would protect whistleblowers who report fraud at such companies, even if a whistleblower is the employee of such a company's contractor or agent. We disagree that Congress meant to cast so broad a net.

at both Enron and Andersen attempted to report or 'blow the whistle' on fraud, but they were discouraged at nearly every turn." *Id.* at 4-5. The report also cites the fact that an "Andersen partner was apparently removed from the Enron account when he expressed reservations about the firm's financial practices in 2000" as an "example" of "a culture, supported by law, that discourage[d] employees from reporting fraudulent behavior." *Id.* at 5.

Congress's concern about Arthur Andersen was addressed by special provisions as to accountants. *See* SOX tit. I, 116 Stat. at 750-71 ("Public Company Accounting Oversight Board"); SOX tit. II, 116 Stat. at 771-75 ("Auditor Independence"). The committee's concerns regarding the integrity and independence of accountants and auditors are addressed in SOX by virtue of these provisions, and not by an expansive definition of "employee" in § 1514A(a).

2. Post-enactment legislative activity

After SOX's enactment, there have been two relevant attempts to amend the Act, one successful, the other not. As the Court said in *North Haven Board of Education v. Bell,* 456 U.S. 512 (1982), "[a]lthough postenactment developments cannot be accorded 'the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of' " previous enactments. *Id.* at 535 (quoting *Cannon v. Univ. of Chi.,* 441 U.S. 677, 686 n.7 (1979));

see also Goncalves v. Reno, 144 F.3d 110, 133 (1st Cir. 1998) ("[S]ubsequent legislative developments, although never determinative in themselves, can be 'significant' clues to congressional intent." (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987))).

We turn to the failed effort to expand the term "employee" in § 1514A(a).[18] In 2004, Senator Fitzgerald introduced in the Senate a bill entitled the Mutual Fund Reform Act of 2004 (MFRA). S.2059, 108th Cong. (2004). Section 116(b) of MFRA would have amended § 1514A(a) to explicitly cover employees of investment advisers to mutual funds. As amended by MFRA, § 1514A(a) would have read:

> Whistleblower Protection for Employees of Publicly Traded Companies *and Registered Investment Companies* – No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file

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[18] We acknowledge that "failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *United States v. Craft*, 535 U.S. 274, 287 (2002) (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)). However, the Court has used failed attempts to amend statutory language as aids to understanding Congress's intent. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000) ("Congress considered and rejected bills that would have granted the FDA" jurisdiction to regulate tobacco."); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 534 (1982) ("Congress has refused to pass bills that would have amended § 901 to limit its coverage of employment discrimination.").

> reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), *or that is an investment adviser, principal underwriter, or significant service provider (as such terms are defined under section 2(a) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a))) of an investment company which is registered under section 8 of the Investment Company Act of 1940,* or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee –

S. 2059, 108th Cong. § 116(b) (emphasis added). MFRA was referred to the Senate Committee on Banking, Housing, and Urban Affairs, but it was never reported out of that committee.[19]

Defendants argue that MFRA is evidence that Congress did not believe § 1514A(a) covered employees of private contractors to public companies; if it did, then MFRA's amendment would have been superfluous. We are more cautious, because there is no statement in MFRA's legislative history regarding its sponsors' understanding of section 116(b) or of

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[19] MFRA was also introduced in the House in 2004 as H.R. 4505 and referred to the Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises. It was never reported out of that subcommittee.

§ 1514A(a).[20] *Cf. Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) (considering legislative history discussing why Congress chose to amend a certain provision in one way but not another, and stating "while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight" (citations omitted)). The Supreme Court has stated that "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Craft*, 535 U.S. at 287 (alteration in original) (quoting *Cent. Bank of Denver, N.A.*, 511 U.S. at 187) (internal quotation marks omitted). At most, this is a clue, but far from conclusive.

Later, Congress did amend § 1514A(a). In 2010 the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) amended § 1514A by explicitly extending whistleblower coverage to employees of public companies' subsidiaries and employees

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[20] The only statements regarding MFRA's whistleblower protection amendment in the Congressional Record are general. *See, e.g.*, 150 Cong. Rec. S794 (daily ed. Feb. 10, 2004) (statement of Sen. Fitzgerald) ("[MFRA] puts the interests of investors first by: . . . instituting Sarbanes-Oxley-style provisions for independent accounting and auditing, codes of ethics, chief compliance officers, compliance certifications, and whistleblower protections.").

of statistical rating organizations. Section 1514A(a) as amended by Dodd-Frank reads:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) *including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c)),* or any officer, employee, contractor, subcontractor, or agent of such company *or nationally recognized statistical rating organization,* may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee –

18 U.S.C. § 1514A(a), *as amended by* Pub. L. No. 111-203 §§ 922(b), 929A, 124 Stat. 1376, 1848, 1852 (2010) (emphasis added).

The report of the Senate Committee on Banking, Housing, and Urban Affairs accompanying Dodd-Frank explains that section 929A of that Act amended § 1514A(a) "to make clear that subsidiaries and affiliates of issuers may not retaliate against whistleblowers." S. Rep. No. 111-176, at 114 (2010). The committee believed such a clarification was necessary

because "[t]he language of [§ 1514A(a)] may be read as providing a remedy only for retaliation by the issuer, and not by subsidiaries of an issuer." *Id.*[21]

Furthermore, Senator Cardin, in remarks introducing an amendment to Dodd-Frank that became section 922(b) of that Act, explained that "Section 1514[A] delineates which companies are covered by [SOX] and what actions are prohibited. The Cardin-Grassley amendment expands the provision to include employees of the rating companies." 156 Cong. Rec. S3349 (daily ed. May 6, 2010). In the course of these remarks, Senator Cardin characterized § 1514A(a) as enacted by SOX as

> extend[ing] whistleblower protections to employees of any company that is registered under the SEC Act of 1934 or that is required to file reports under section 15(d) of the same act. The whistleblower provisions of the Sarbanes-Oxley Act protect employees of the publicly traded companies from retaliation by giving victims of such treatment a cause of action which can be brought in Federal court.

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[21] As described later, the fact that DOL had issued what were non-substantive procedural regulations says nothing about congressional intent in SOX, enacted years earlier. That fact also is irrelevant to the Dodd-Frank amendments because Congress said its concern was to clarify § 1514A(a), and it said nothing about a regulation from DOL, much less one that did not and could not purport to provide a substantive interpretation of the SOX language at issue.

Id. Notably, Senator Cardin's statement again confirms that the covered employees are only those of publicly traded companies.

Dodd-Frank's successful amendments of § 1514A(a) are not subject to the rule of judicial wariness about legislative inaction. Rather, these later actions by Congress are entitled to some weight as an expression of Congress's understanding of § 1514A(a)'s meaning, which is consistent with our interpretation.

III.

No Deference Owed to Agency Positions

Congress chose not to give authority to the SEC or the DOL to interpret the term "employee" in § 1514A(a). So there is no basis for *Chevron* deference. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Because the term "employee" in § 1514A(a) is not ambiguous, we would not defer to an administrative agency's contrary determination, even had Congress delegated authority to the agency. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 127 S. Ct. 2518, 2534 (2007) ("[D]eference is appropriate only where 'Congress has not directly addressed the precise question at issue' through the statutory text.") (quoting *Chevron,* 467 U.S. at 843); *Saysana v. Gillen,* 590 F.3d 7, 16 (1st Cir. 2009) (because statutory language before the court "is unambiguous, there is nothing for the agency to interpret – no gap for it to fill – and

there is no justification for resorting to agency interpretation to address an ambiguity"); *Succar v. Ashcroft,* 394 F.3d 8, 22-24 (1st Cir. 2005) (declining to defer to agency's interpretation of statute where statute's text is clear).

Here, independently, no deference is owed for the other reasons we discuss. The DOL, supported by the SEC, makes a threefold argument in favor of plaintiffs' interpretation. First, as to the particular OSHA regulations regarding coverage under § 1514A(a), the Secretary of Labor admits these regulations are entitled to no deference, and the defendants agree, for the reasons we state below.[22] OSHA has promulgated regulations regarding § 1514A in its capacity as the body with delegated authority to enforce its

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[22] We accepted in dicta in *Day v. Staples, Inc.,* 555 F.3d 42, 54 & n.7 (1st Cir. 2009), that certain DOL regulations concerned with a two-part test for what constituted "reasonable belief" under SOX were entitled to *Chevron* deference. That test was also contained in the relevant case law. *Day* did not concern the issue here, nor the regulation relied on here. That statement in *Day* was not necessary to the holding in that case but was rather dicta, nor was the holding in the case concerned with the precise regulations at issue here. *Day* is easily distinguishable, and that dicta in *Day* is not binding on this panel. *Kosereis v. Rhode Island,* 331 F.3d 207, 213 (1st Cir. 2003).

Beyond that, the Secretary of Labor has disclaimed *Chevron* deference for the regulations at issue. In addition, the notice of final rulemaking promulgating them states that the procedural regulations are "not intended to provide statutory interpretations." 69 Fed. Reg. 52104, 52105 (Aug. 24, 2004).

provisions.[23] These regulations purport to "implement[ ] procedures under section 806" of SOX, 29 C.F.R. § 1980.100(a) (2009), and they construe § 1514A(a)'s coverage provisions in plaintiffs' favor, *see id.* § 1980.101-.102.[24]

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[23] Section 1514A delegates to the Secretary of Labor the authority to enforce the statute through formal adjudication. *See* 18 U.S.C. § 1514A(b)(1) ("A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c) by . . . filing a complaint with the Secretary of Labor. . . ."). The Secretary delegated enforcement responsibility for § 1514A to the Assistant Secretary of Occupational Health and Safety, *see* 67 Fed. Reg. at 65,008, and review of decisions by ALJs to the DOL's ARB, *see* 67 Fed. Reg. at 64,272-73.

[24] The regulations in effect at the pertinent times in this case state that

> "[n]o company or company representative may discharge, demote, suspend, threaten, harass or in any other manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, has engaged in any of the activities specified in paragraphs (b)(1) and (2) of this section."

29 C.F.R. § 1980.102(a) (2009). The regulations define "company representative" to mean "any officer, employee, contractor, subcontractor, or agent of a company," *id.* § 1980.101, and "employee" to mean "an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative," *id.*

These regulations, *id.*, are not entitled to *Chevron* deference, as the Secretary admits. *See Chevron,* 467 U.S. at 842-43. In addition, in promulgating the rules, the DOL made it clear the rules were not interpretations of the Act. In the notice of final rulemaking promulgating these regulations, OSHA repeatedly states that "[t]hese rules are procedural in nature and are not intended to provide interpretations of the Act." 69 Fed. Reg. 52,104, 52,105 (Aug. 24, 2004). In this case, the DOL has explicitly stated that "[t]he Department of Labor does not have substantive rulemaking authority with respect to section 1514A" and thus the Secretary of Labor does not seek *Chevron* deference "for her procedural regulations."

We also conclude that these particular OSHA regulations are not entitled to *Skidmore* deference for several reasons, including that the text of the statute does not permit even that level of deference. *See Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944). Congress has made the choice and not given the agency a role. Further, "the *Skidmore* standard entails . . . a sliding-scale approach under which the degree of deference accorded to an agency interpretation hinges on a variety of factors, such as 'the thoroughness evident in [the agency's] consideration, the validity of its reasoning, [and the] consistency [of its interpretation] with earlier and later pronouncements.'" *Doe v. Leavitt,* 552 F.3d 75, 81 (1st Cir. 2009) (alterations in original) (quoting *Skidmore,* 323 U.S. at 140). Moreover, as the Supreme Court has stated, an agency's statutory "interpretation is 'entitled to

respect' only to the extent it has the 'power to persuade.'" *Gonzales v. Oregon,* 546 U.S. 243, 256 (2006) (quoting *Skidmore,* 323 U.S. at 140). The notice of final rulemaking here contains no reasoning to support OSHA's construction of the coverage provisions of § 1514A(a), saying only that "OSHA believes that [its regulations] accurately reflect the statutory language." 69 Fed. Reg. at 52,105-06. OSHA's reading, which it states is not a statutory interpretation, lacks the "power to persuade." We also note that the DOL's amicus brief does not argue that these particular OSHA regulations should be accorded *Skidmore* deference, nor does the SEC.

Second, if there were an on-point holding of the ARB, it might be entitled to some deference as to any ambiguity in the statute. The point is irrelevant for two reasons. First, we find no ambiguity, so no deference is owed. *Cf. Welch v. Chao,* 536 F.3d 269, 276 n.2 (4th Cir. 2008) (according deference to a decision of the ARB interpreting § 1514A because the statute expressly delegated to the Secretary of Labor authority to enforce the statute by formal adjudication and the Secretary delegated that power to the ARB). Second, there is in any event no ARB decision on point,[25] and the ALJ in the Zang case, at the level

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[25] In *Johnson v. Siemens Building Technologies, Inc.*, the complainant brought a claim of retaliation under § 1514A against her employer, a subsidiary of a publicly traded company. The ARB disposed of the case by holding that § 1514A(a) as enacted by SOX covered employees of subsidiaries of public companies. In dicta to which no deference could be owed, the

(Continued on following page)

below the ARB, reached a conclusion consistent with ours. *See Zang*, 2008 WL 7835900.

We have considered the arguments in the amicus briefs of the DOL and SEC, but we owe no deference to the positions stated there. The SEC has no rule-making or enforcement authority as to § 1514A, so its interpretation of that provision, in any form, would be owed no deference in any event. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143-44 (2002); *FLRA v. U.S. Dep't of the Navy*, 941 F.2d 49, 55 (1st Cir. 1991). The arguments advanced by the DOL, which does have authority to enforce § 1514A, *see* 18 U.S.C. §§ 1514A(b)(1), 1514A(b)(2)(A); 49 U.S.C. § 42121(b), mirror the textual arguments of the plaintiffs and are not based on the DOL's "specialized experience." *Skidmore*, 323 U.S. at 139. In addition, we view the text of § 1514A(a) as clear.

IV.

Conclusion

If we are wrong and Congress intended the term "employee" in § 1514A(a) to have a broader meaning than the one we have arrived at, it can amend the statute. We are bound by what Congress has written.

ARB stated that SOX's "legislative history demonstrates that Congress intended to enact robust whistleblower protections for more than employees of publicly traded companies." 2011 WL 1247202, at *12.

Reversed and remanded with instructions to dismiss the actions. No costs are awarded.

– – Dissenting Opinion Follows – –

THOMPSON, *Circuit Judge*, dissenting. Because my colleagues impose an unwarranted restriction on the intentionally broad language of the Sarbanes-Oxley Act, employ a method of statutory construction diametrically opposed to the analysis this same panel employed just weeks ago, take pains to avoid paying any heed to considered agency views to which circuit precedent compels deference, and as a result bar a significant class of potential securities-fraud whistleblowers from any legal protection, I dissent.

Accepting the allegations in the complaint as true, plaintiffs Lawson and Zang are ex-employees of private companies that contract to advise or manage the publicly held Fidelity-brand mutual funds. The mutual funds themselves have no employees. Both plaintiffs blew the whistle on putative fraud by the mutual funds, and both were fired (actually or constructively) by their employers.

The Sarbanes-Oxley Act purports to protect securities-fraud whistleblowers. Specifically, § 806 of the Act provides that "[n]o company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78*l*), or that is required to file reports under section 15(d) of the

Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee" to report activity the employee reasonably suspects to be securities fraud. 18 U.S.C. § 1514A(a) (prior to amendment by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010).

For present purposes, it is undisputed that the Fidelity mutual funds fall under § 806, that the plaintiffs' employers contracted with the Fidelity mutual funds, and that the plaintiffs' employers discharged the plaintiffs – their employees. In other words, in each case a "contractor . . . of such company . . . discharge[d] . . . an employee." *Id.* One might think our inquiry would end here: Sarbanes-Oxley's whistleblower-protection provision by its terms applies. According to the majority, however, one would be incorrect.

The majority engage in a faulty statutory-interpretation exercise, one whose wrongness is perhaps best highlighted through contrast with our recent decision in *United States v. Ozuna-Cabrera,* 663 F.3d 496 (1st Cir. 2011). In *Ozuna-Cabrera,* we held that application of the "Aggravated Identity Theft" statute is not restricted to situations involving traditional theft. *Id.* at 501. This is how our analysis went:

First, we looked to the plain language of the statute and noted that it contained no restriction limiting the statute's application to situations involving theft. *Id.* at 498-99. Instead, the statute contained only the broad phrase "without lawful authority." *Id.* Second, we looked to the statutory framework, noting that the phrase "without lawful authority" was used in the statutes criminalizing both identity fraud and aggravated identity theft. *Id.* at 499. Because identical language appeared in both, related statutes, only one of which referenced theft at all (albeit in the title), we deemed it unlikely that Congress intended the phrase to import the elements of common-law theft. *Id.* Third, in a footnote, we looked to the statutory title (which, again, referenced theft) and noted that "we do not rely on the titles of statutory enactments in plumbing their meaning . . . at the expense of the text itself." *Id.* at 499 n. 3 (internal quotation marks removed). We also noted that it was by no means clear that the word "theft" in the title was intended to limit the effective language of the statute. *Id.* (citing *United States v. Godin,* 534 F.3d 51, 59 (1st Cir. 2008)). Fourth and finally, we looked at legislative history and noted that implicitly restrictive references to "theft" could not limit the scope of broad statutory language. *Id.* at 500. More specifically, nothing in the legislative history explicitly suggested "that Congress intended to so narrowly restrict the statute's reach." *Id.* Instead, the legislative history "demonstrate[d] that Congress intended [the statute] to address a wide array of" conduct. *Id.* Applying this

same analysis to the present case produces a very different result than the one the majority reach.

First, looking to the plain language of the statute, one can only conclude that there is no restriction limiting the statute's application to employees of publicly held companies.[26] As I have already pointed out, boiling the statute down to its relevant syntactic elements, it provides that "no . . . contractor . . . may discharge . . . an employee." 18 U.S.C. § 1514A(a). The statute does not limit its coverage to "an employee of a publicly held company" – it just refers broadly to "an employee."

In fact, the majority's interpretation offends a longstanding rule of statutory interpretation, violating the statutory language by rendering the word "contractor" in the statute superfluous. *See, e.g., United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751-52 (1st Cir. 1985) (providing that "no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous"). The majority suggest that the word "contractor" might be intended only to refer to so-called

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[26] In addition to our own recent decision in *Ozuna-Cabrera*, a days-old Supreme Court decision has just reaffirmed the impropriety of imposing extra-textual limitations on statutes: where "[t]here is no indication in the text . . . that the [statute] excludes [particular] workers from . . . coverage," the reasonable conclusion is "that Congress did not limit the scope of [the statute]'s coverage." *Pac. Operators Offshore, LLP v. Valladolid*, No. 10-507, 2012 WL 75045, at *8 (U.S. Jan. 11, 2012).

"ax-wielding specialists" that public companies bring in to lay off employees. Maj. Op. 17 n.11; *see also Fleszar v. U.S. Dept. of Labor*, 598 F.3d 912, 915 (7th Cir. 2010) (employing the term "ax-wielding specialist" and providing the example of "the character George Clooney played in 'Up in the Air'"). If that is indeed the case, it is a mystery why Congress did not say so specifically. But more importantly for present purposes, when ax-wielding specialists actually fire public-company employees they are acting as agents (rather than mere contractors) of the public company. And § 806 specifically lists agents as covered entities, just like contractors. The word "contractor," therefore, must be doing something else. In the end, then, not only do the majority impose extratextual limitations on § 806, but they also effectively evict the word "contractor" from the statute.[27] This is simply wrong. *See Ven-Fuel*, 758 F.2d at 751-52.

Second, looking to the statutory framework, one sees that Congress explicitly enacted narrower whistleblower protection elsewhere in Sarbanes-Oxley, that Congress was explicit where it intended to regulate public entities only, and that Congress's choices about different mechanisms for different entities support the plaintiffs' reading of the Act. *Cf.*

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[27] The majority state correctly that their interpretation does not render superfluous the *phrase* "officer, employee, contractor, subcontractor, or agent of such company" – but that is not my point. Maj. Op. 16. My point, which remains unrebutted, is that their interpretation renders superfluous the *word* "contractor."

Maj. Op. 21-22 (noting that Congress explicitly "enact[ed] broader whistleblower protection elsewhere . . . was explicit . . . where it intended to regulate non-public entities . . . [and] made choices about different regulatory mechanisms for different entities").

An example of Congress's enactment of narrower whistleblower protection appears in Sarbanes-Oxley § 501, which bars "a broker or dealer and persons employed by a broker or dealer" from retaliating against "any securities analyst employed by that broker or dealer or its affiliates." 15 U.S.C. § 78o-6(a)(1)(C). Congress could have similarly narrowed the definition of "employee" in § 806, but it chose not to do so. We should honor that choice.[28] *Limone v. United States,* 579 F.3d 79, 105 (1st Cir. 2009); *see also Pac. Operators,* 2012 WL 75045, *6 ("Congress' decision to specify, in scrupulous detail, exactly where the other subsections of § 1333 apply, but to include no similar restriction . . . in § 1333(b), convinces us that Congress did not intend" to so limit § 1333(b).).

An example of Congress's specific reference to publicly held companies appears in § 806 itself.

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[28] Moreover, the majority's contrary example of broader whistleblower protection elsewhere in Sarbanes-Oxley is wrong. Not only is the referenced provision (§ 1107, enacted at 18 U.S.C. § 1513) actually narrower than § 806 in some respects – for example, it covers whistleblowing only to police, not to work supervisors – but it also does nothing to protect whistleblowers. In essence, it is nothing more than a criminal obstruction-of-justice statute targeted at wrongdoers, not a whistleblower-protection statute targeted at the wronged.

Section 806 specifically invokes companies "with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78*l*)" or "required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d))." The section goes on to list a number of other covered entities, including contractors. It also uses the modifier "of such companies" at one point to refer to, e.g., contractors, but notably *not* to refer to employees. In fact, the section does not limit the word "employees" in any way. Again, we should honor Congress's choice to employ broad language. *Limone,* 579 F.3d at 105.

And the majority's own examples of Congress's electing to apply different mechanisms to different entities highlight the correctness of a broad reading of § 806. The majority note that "[e]lsewhere in SOX, Congress did specifically address investment companies and investment advisers." Maj. Op. 27. The first example they look to is a provision that *exempts* investment entities (including mutual funds and mutual fund advisers) from certain, specific requirements of the Act. *See* 15 U.S.C. § 7263. No such exemption appears in § 806, and the absence of an exemption surely suggests that Congress intended to protect the employees of mutual fund advisers.[29] The majority's second example – 15 U.S.C. § 80b-3 – deals with the "Registration of investment advisers" and

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[29] Indeed, as the majority note, Congress "made it explicit when it intended coverage *and when it did not*." Maj. Op. 27 (emphasis added).

says nothing of whistleblowers. Maj. Op. 27. The existence of a section tailored to investment advisers hardly exempts such entities from Sarbanes-Oxley's broader provisions – like § 806. After all, Congress knew how to exempt investment entities when it wanted to do so. *See* 15 U.S.C. § 7263.

Third, the statute's title and caption do not compel a limited reading of its language; instead, the majority's strained reading comes "at the expense of the text itself." *Ozuna-Cabrera,* 663 F.3d at 499 n.3. I have already explained how nothing in either the text or the context of § 806 actually supports the limitation conjured by the majority. A few words in a title are not sufficient to change that rock-solid fact. That insufficiency is especially glaring where, as here, the title does not purport to apply any explicit limitations (e.g., "whistleblower protection for employees of public companies *only*") but merely describes a specific and common application of a more generally applicable statute.[30] *Cf. Ozuna-Cabrera,* 663 F.3d at 500 ("aggravated identity theft" may commonly apply to "criminals who actually steal other people's identities," but this is only one application of a broad statute). Under *Ozuna-Cabrera* and other circuit precedent, *see, e.g., Mass. Ass'n of Health Maint. Orgs. v. Ruthardt,* 194 F.3d 176, 180 (1st Cir. 1999), the title gets the majority nowhere.

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[30] I repeat: the title contains no "explicit guides to the limits" on § 806. Maj. Op. 18.

Fourth, nothing in the legislative history of Sarbanes-Oxley indicates congressional intent to limit whistleblower protection to employees of public companies. Instead, the legislative history all refers positively to extending whistleblower protection in order to encourage the reporting of securities fraud.

According to Sarbanes-Oxley's Senate conference report (Section I, titled "PURPOSE") a key purpose of the chapter that includes § 806 is "to protect whistleblowers who report fraud against retaliation by their employers." S. Rep. No. 107-146, at *1 (2002). There is no mention of any limitation on which employers are covered. The breadth of this specific purpose comports with the Act's overall purpose: "to prevent and punish corporate and criminal fraud, protect the victims of such fraud, preserve evidence of such fraud, and hold wrongdoers accountable for their actions." *Id.* Indeed, this very court has endorsed a broad understanding of the Act's purpose, noting that "[t]he § 1514A whistleblower provision thus serves to 'encourage and protect [employees] who report fraudulent activity that can damage innocent investors in publicly traded companies'" and that "[i]t also aimed 'to provide federal protection to private corporate whistleblowers.'" *Day v. Staples, Inc.*, 555 F.3d 42, 52 (1st Cir. 2009) (alteration in original) (quoting S. Rep. No. 107-146, at *17 (2002), and *Carnero v. Bos. Scientific Corp.*, 433 F.3d 1, 11 (1st Cir. 2006)). Again, extending whistleblower protection to employees of

contractors fits both with the specific whistleblower-protection purpose of Sarbanes-Oxley and with its broader anti-fraud purpose.

Moreover, none of the legislative history the majority rely on actually evidences any congressional intent to *limit* the scope of § 806's whistleblower protection. All of the statements the majority highlight denote intent to protect employees of publicly traded companies. *See* Maj. Op. 37-38. Such protection is a wholly uncontroversial and undisputed effect of § 806.[31] The question is whether protection is limited to employees of public entities only. And none of the majority's sources – indeed, no source at all – expresses any intent to restrict § 806 so narrowly.[32]

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[31] Also uncontroversial and undisputed is the majority's discussion in its "Legislative History" section of Congress's addressing "concern about Arthur Andersen" with "special provisions as to accountants." Maj. Op. 39. In addition to being uncontroversial and undisputed, however, Sarbanes-Oxley's special provisions as to accountants are irrelevant here.

[32] The majority's reference to Senator Cardin's statement is a textbook example of their imputing an intent to limit where none is evident. Specifically, Senator Cardin's statement says that "[t]he whistleblower provisions of the Sarbanes-Oxley Act protect employees of the publicly traded companies," 156 Cong. Rec. S3349 (daily ed. May 6, 2010); the majority say this statement "confirms that the covered employees are *only* those of publicly traded companies." Maj. Op. 44 (emphasis added). As I point out above, the word "only" would indeed indicate limiting intent – if it appeared in Senator Cardin's statement (or, for that matter, in absolutely any relevant legislative materials whatsoever). But it does not, so neither does any limiting intent.

Cf. Ozuna-Cabrera, 663 F.3d at 500 ("Without question, Congress harbored concerns over criminals who actually steal other people's identities. There is nothing to suggest, however, that Congress intended to so narrowly restrict the statute's reach."). It is strange that the same circumstance – lack of congressional intent to limit broad statutory language – could cut so differently in two different cases.

And the majority's reliance on subsequent legislative history is entirely misplaced. Not only does their reading of the whistleblower provision's subsequent amendment defy their own faulty logic, but they also ignore the administrative backdrop against which Sarbanes-Oxley was amended by Dodd-Frank.

On the first point, the majority's read of Dodd-Frank defeats their overall conclusion as a matter of simple grammar. On the one hand, they say that the phrase (from 18 U.S.C. § 1514A) "No [public company], or any . . . contractor . . . of such company, may discharge . . . an employee" *does not* extend protection to employees of contractors. On the other hand, they say that the phrase (from the same section, post-Dodd-Frank) "No [public company] . . . or nationally recognized statistical rating organization . . . may discharge . . . an employee" *does* apply to employees of ratings companies. Maj. Op. 42 (noting that Dodd-Frank "explicitly extend[ed] whistleblower coverage to . . . employees of statistical rating organizations"). In these phrases, "contractor" and "rating organization" are syntactic equivalents and should therefore be given equal effect. The statute plainly protects

both employees of contractors *and* employees of rating companies.

As to the majority's ignoring the administrative backdrop, let us start with the well-settled proposition that the courts, when construing a statute, assume that at the time of the statute's enactment, Congress was aware of courts' and agencies' interpretations of existing law. *Lorillard v. Pons,* 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change."). At the time of Dodd-Frank, the Department of Labor (which is statutorily tasked with administratively adjudicating § 806 whistleblower claims, *see* 18 U.S.C. § 1514A(b)(1)) had issued notice-and-comment regulations explicitly providing that § 806 applied to employees of contractors of public companies. 29 C.F.R. § 1980.101 (2009) (defining "employee" as "an individual presently or formerly working for a company or company representative" and "company representative" as, e.g., "any . . . contractor . . . of a company"). In enacting Dodd-Frank in 2010, then, Congress had a miles-wide opening to nip Labor's regulation in the bud if it had wished to do so. It did not. To the (very limited) extent subsequent legislative history tells us anything here, it tells us that the majority are incorrect.

So if circuit precedent has any kind of methodological value then the majority go about things exactly backwards in this case. To reiterate: contrary to this panel's analysis in *Ozuna-Cabrera,* the majority

ignore the text of § 806, take a myopic view of the section's context, wrongly inflate the section's title into operative law, and attribute a limiting intent to legislative history that in reality supports a broad reading of the statute. Again, the majority are wrong.[33]

To the extent the majority rely on analogous statutes, they get that wrong, too. There is indeed evidence that Sarbanes-Oxley was based in part on the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR"). *See* S. Rep. 107-146, at *26 (2002). The relevant provision of AIR is entitled "Discrimination against airline employees," and reads, "[n]o air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee." 49 U.S.C. § 42121(a). This structure perfectly parallels § 806's:

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[33] The majority's result seems to be driven by § 806's "very broad coverage." Maj. Op. 17. But very broad coverage was the precise goal of § 806. *See* Maj. Op. 37 n.17 (considering legislative history supporting broad whistleblower coverage, then rejecting that history by ipse dixit). The majority also refer obliquely to "anomalies" that would occur if we were to give § 806 the broad scope Congress intended; however, they never identify what those "anomalies" are. Maj. Op. 17. I, for one, can discern no "anomalies" in a determination that § 806 protects whistleblowers against retaliation by their employers. If the majority consider anomalous the unlikely scenario where an employee of, say, office superstore Staples manages to spot and report securities fraud in the course of, say, printing and binding a public company's financial reports, I see no reason why that employee should not be a protected whistleblower as a matter of either law or policy.

"[n]o company . . . or any . . . contractor [or] subcontractor . . . of such company, may discharge . . . or in any other manner discriminate against an employee." Just as in § 806, AIR does not specify whether it protects employees of carriers only or whether it protects employees of contractors and subcontractors as well. The majority conclude that AIR protects employees of carriers, contractors, and subcontractors, but that § 806 protects only employees of public companies, primarily because – in the majority's view, notwithstanding the broad language passed by the legislative branch and the considered interpretation of the executive branch – § 806 would be excessively broad.[34] Maj. Op. 28-29. This is judicial overreaching of the highest order.[35]

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[34] AIR, according to the majority, is not *excessively* broad because it includes a subsection that narrowly defines "contractor." But the majority's reliance on AIR's narrower provision as the example proving that § 806's apparently broader provision is actually narrower than AIR's is a logical Escher stairway – it's just as nonsensical as it sounds. That AIR has a limiting definition means AIR is narrow. That § 806 has no limiting definition means § 806 is broad. Logic and grammar preclude any contrary conclusion. And the same reasoning demonstrates that the majority cannot properly rely on analogous whistleblower statutes that include limiting definitions. *See* Maj. Op. 31-32 (discussing the Energy Reorganization Act, 42 U.S.C. § 5851(a)(1), and the Pipeline Safety Improvement Act, 49 U.S.C. § 60129(a)).

[35] Indeed, during this appeal's pendency, the Supreme Court has again reaffirmed the impropriety of judges' limiting the scope of a statute's coverage for policy reasons: "'[I]f Congress' coverage decisions are mistaken as a matter of policy, it is for

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Other basic principles of statutory interpretation support a broad reading of § 806 and undermine the majority's reasoning. These principles are: (1) that we broadly interpret remedial statutes; (2) that we narrowly interpret criminal and immigration statutes; and (3) that we presume a statute will not create a right of action by implication. The relevance of these principles here is not immediately apparent, so I will explain.

First, courts generally adhere to the principle that "[r]emedial statutes are liberally construed to suppress the evil and advance the remedy." 3 Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 60:1 (7th ed. 2010); *accord Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 307 (1st Cir. 2003) (citing *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967)). It should be achingly clear at this point that § 806 is remedial in nature; specifically, it aims to remedy the evil of companies' firing employees for reporting putative securities fraud. Where the statutory language supports a broad reading that comports with that remedial purpose, precedent calls for courts to implement that broad reading. *See Dudley*, 333 F.3d at 307. The majority inexplicably fail to heed this call.

Congress to change them. We should not legislate for them.'" *Pac. Operators*, 2012 WL 75045 at *9 (quoting *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 427 (1985)).

Second, at the opposite end of the interpretative spectrum is the so-called rule of lenity, an "ancient rule of statutory construction that penal statutes should be strictly construed against the government . . . and in favor of the persons on whom penalties are sought to be imposed." 3 Singer, *Sutherland Statutory Construction* § 59:3. In *Ozuna-Cabrera,* a criminal case, we held that this principle had no place because the text did not support the defendant's proposed limitations. *See* 663 F.3d at 498-99. Now, in a context where we are supposed to default to breadth and reject narrowness, the majority nevertheless impose analogous extratextual limitations. This is precisely backwards.

In fact, in rejecting a broad reading of § 806 and imposing a narrow one, the majority rely in significant part on cases where (unlike here) narrow interpretations were absolutely appropriate under the rule of lenity. For example, in *I.N.S. v. Nat'l Ctr. for Immigrants' Rights, Inc. (NCIR),* 502 U.S. 183 (1991), the Supreme Court narrowed the scope of the word "employment" as used in a statute imposing restrictive bond conditions on aliens embroiled in removal proceedings.[36] In other words, by narrowing the types

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[36] The rule of lenity applies to immigrants in removal proceedings as well as defendants in criminal proceedings. *See, e.g., I.N.S. v. St. Cyr,* 533 U.S. 289, 320 (2001) (relying on "'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien'" (quoting *I.N.S. v. Cardoza-Fonseca,* 480 U.S. 421, 449 (1987))).

of employment that immigrants could not undertake while out on bond, the Court benefitted them and thereby honored the rule of lenity. *NCIR* does not by any means suggest that a restrictive interpretation is appropriate to strip intentionally broad legal protections from whistleblowers.[37]

Third and last is the presumption against implied rights of action. The majority repeatedly cite cases expressly applying this principle as if these cases somehow support limiting *explicit* causes of action, too. Here is a list of several such cases on which the majority wrongly rely: *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2303 (2011) (holding that a mutual fund adviser may not be found liable for a mutual fund's violation of SEC Rule 10b-5, in part because of "the narrow scope that [courts] must give the implied private right of action"); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 772 (2008) (noting that courts should limit the scope of implied rights of action because judicial creation of such remedies "runs contrary to the established principle that '[t]he jurisdiction of the federal courts is guarded against

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[37] Let me be perfectly clear: my point is that the majority are wrong to rely on cases subject to the rule of lenity. And despite disclaiming any reliance on the *rule*, the majority still rely on *cases* where the rule applies. *Compare* Maj. Op. 19-20 (providing that the majority "follow the same reasoning" as *NCIR*), *with* Maj. Op. 35 (providing that "the rule of lenity has no place in our interpretation of § 1514A(a)").

expansion by judicial interpretation'" (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 746-47 (1979) (Powell, J., dissenting))); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176 (1994) (holding that the implied right of action under SEC Rule 10b-5 does not extend to aiders and abetters because "Congress knew how to impose aiding and abetting liability when it chose to do so"); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734 (1975) (limiting the availability of the implied right of action under Rule 10b-5 to actual purchasers and sellers of securities, in part because "[w]hen Congress wished to provide a remedy to those who neither purchase nor sell securities, it had little trouble doing so expressly"). Here, we are not faced with an implied right of action that should be applied narrowly; instead, we are dealing with a statute that expressly creates a broad right of action for employee-whistleblowers who suffer retaliation at their employers' hands. By rejecting Congress's intentional breadth, the majority undermine the legislative process in precisely the same way that the Supreme Court has warned against time and time again in the context of implied rights of action. That they do so by restricting a broad statute rather than expanding a narrow statute is beside the point: they are still usurping Congress's lawmaking role in our system of government.

Even more egregious, though, is the majority's conclusion – after thirty-five pages construing a statutory provision to which they say "different

readings may be given," Maj. Op. 14 – that the statute is "not ambiguous" and even "clear" in imposing a limitation on the word "employee" that appears nowhere in the statute's text. *Id.* at 44, 49. This peculiar determination[38] appears to be nothing more than a mechanism for rejecting the views of multiple federal agencies[39] that come into daily contact with the Sarbanes-Oxley Act and its whistleblower provision, and for downplaying this court's earlier determination that agency views are entitled to deference. In fact, the clearest thing about the statute is its breadth, as the Department of Labor's regulations confirm.

As I've mentioned above, the Department of Labor has adjudicatory authority over Sarbanes-Oxley whistleblower complaints.[40] 18 U.S.C. § 1514A(b)(1). To exercise that authority, the Department of Labor has promulgated regulations regarding Sarbanes-Oxley.

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[38] The determination is peculiar, in part, because of the basic principle that a court will generally look beyond a statute's text only when interpreting ambiguous statutes. *See, e.g., Gen. Motors Corp. v. Darling's*, 444 F.3d 98, 108 (1st Cir. 2006) (noting that "we . . . will only look behind the plain language to the legislative history if we find the statute ambiguous" (internal quotation marks omitted)).

[39] Although my dissent limits its discussion to the Department of Labor's regulations, the Securities and Exchange Commission, too, has filed an amicus brief in this case urging the same broad interpretation of § 806.

[40] Congress has not given Labor substantive rule-making authority, but this does not matter for reasons I will discuss shortly.

29 C.F.R. § 1980.100 *et seq.* The regulations specifically provide that Sarbanes-Oxley's whistleblower protection extends to employees of contractors of public companies. *Id.* § 1980.101. On this point, Labor found the statute as clear as I do: the regulations proclaim that they are non-interpretative, 69 Fed. Reg. 52104, 52105 (Aug. 24, 2004), so Labor must have thought the statute simply means what it says: "[n]o . . . contractor . . . of such company[ ] may discharge . . . an employee" for reporting fraud. 18 U.S.C. § 1514A(a). And we have previously held that the regulations are entitled to *Chevron* deference, *Day,* 555 F.3d at 54 & n.7, meaning that we should honor Labor's read of the statute unless it is arbitrary and capricious or contrary to law. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

Again, all this would seem to end our inquiry. Not only does Sarbanes-Oxley § 806 by its terms protect employees of contractors of public companies, but the agency that handles every § 806 whistleblower complaint has issued formal regulations recognizing that straightforward interpretation, and this court has held that the regulations are owed deference. But, somehow, the authority of all three branches of government does not win the day: the majority disregard Congress's broad language, reject the agency's regulations out of hand, and do their best to neutralize this court's decision in *Day* by labeling it both distinguishable and dicta. Maj. Op. 45 n.22.

Here is what we said in *Day:* "Both the DOL regulations, which are entitled to *Chevron* deference, and the caselaw establish that the term 'reasonable belief' has both a subjective and objective component. We agree." *Day,* 555 F.3d at 54. We then went on to explain why the regulations were due *Chevron* deference, noting among other things that "Congress explicitly delegated to the Secretary of Labor authority to enforce § 1514A by formal adjudication." *Id.* at 54 n.7. This is not the stuff of dicta. We did not merely "accept . . . that certain DOL regulations . . . were entitled to *Chevron* deference," Maj. Op. 45 n.22 – we stated affirmatively that they were, explained our reasoning on the point, and relied on the conclusion in reaching our result. And our broad statement may not have been "concerned with the precise regulations at issue here," *id.*, but it did not purport to involve *precise* regulations; instead, it spoke sweepingly of Labor's regulations regarding § 1514A. If *Day* remains good law then it controls here and we owe deference to Labor's regulations.

That said, we need not go so far as to apply *Chevron* deference here. While the Department of Labor does suggest that *Day* compels some degree of deference, it concedes that the regulations are properly due something less than *Chevron* deference. Naturally, the *Skidmore* doctrine comes to mind.

In *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), the Supreme Court held that considered agency views – even informal ones – should provide guidance to the courts to the extent those views have

the "power to persuade." We have applied the *Skidmore* rule to agencies' views in cases "'where statutory circumstances indicate no [congressional] intent to delegate general authority to make rules with force of law.'" *Navarro v. Pfizer Corp.*, 261 F.3d 90, 99 (1st Cir. 2001) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 237 (2001)). Here we have such a case. Even though Labor lacks statutory authority to issue substantive rules regarding § 806, and even though Labor has labeled its regulations non-interpretative, under *Skidmore* we still cannot just throw its considered views out the window.

Nevertheless, the majority conclude that *Skidmore* has no place here. First, they say, the statute is unambiguous and, therefore, Labor can add nothing to its construction. Maj. Op. 44. On the heels of the majority's lengthy statutory-interpretation analysis, this claim holds no water. A statute that is susceptible of multiple interpretations and whose meaning requires over thirty pages to explain is neither clear nor unambiguous by definition. *See, e.g.*, 2A Singer, *Sutherland Statutory Construction* § 45:2 ("Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses."). And if the statute is not, in fact, unambiguous, then *Skidmore* deference is in play.

In guiding judicial inquiry into the appropriate level of respect we should give Labor's views, *Skidmore* requires consideration of "the thoroughness evident in [Labor's] consideration, the validity of its reasoning, [and] its consistency with earlier and later

pronouncements." *Skidmore*, 323 U.S. at 140. First, contrary to the majority's determination that Labor provided "no reasoning," Maj. Op. 48, Labor spent a paragraph explaining that the language of § 806, taken literally, extends protection to employees of contractors of public companies. *See* 69 Fed. Reg. at 52,105-06. The majority never convincingly overcome the agency's simple application of basic grammar to the statute,[41] and so can only pretend it isn't there.

Continuing with the other *Skidmore* factors, the agency's reasoning is valid because the statute's plain language does extend coverage to employees of contractors (as I have explained above). And as for consistency, for as long as the regulations have existed they have consistently extended protection to employees of contractors of public companies. *Compare* 29 C.F.R. § 1980.101 (2003), *with* 29 C.F.R. § 1980.101 (2011), *as amended by* 76 Fed. Reg. 68,084 (Nov. 3, 2011). The majority cannot claim the same consistency in this court's jurisprudence. *Compare Day*, 555 F.3d at 52, 54 & n.7 (noting that § 806 aims to "prohibit[ ] employers from retaliating against employees" and "to encourage and protect employees who report

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[41] In fact, the majority implicitly acknowledge the validity of Labor's grammatical reading earlier in their opinion, when they say it merits "little discussion" that the statute "may be read differently as to the scope of the protected 'employees' as a matter of grammar." Maj. Op. 15. If Labor's paragraph applying the basic rules of language to the statute constitutes "no reasoning," then one wonders how to characterize the majority's "little discussion."

fraudulent activity," and holding that the Labor regulations "are entitled to *Chevron* deference" (internal quotation marks and brackets omitted)), *with* Maj. Op. 45 n.22. Because all three *Skidmore* factors weigh in Labor's favor, we owe deference to the Department of Labor's regulations. And that means § 806 extends whistleblower protection to employees of contractors of public companies.

To sum the whole thing up, § 806 plainly protects whistleblower employees of contractors of public companies; digging deeper into the section's context and legislative history only confirms the breadth of § 806's protections; considered agency views further support a broad read of the statute; and the majority have had to work very hard to reject not only our own precedent but also the views of the other branches of government, to say nothing of grammar and logic. The simple answer to the certified question from the district court[42] is yes. For these reasons, I dissent.

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[42] "Does the whistleblower protection afforded by § 806(a) of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, apply to an employee of a contractor or subcontractor of a public company, when that employee reports activity which he or she reasonably believes may constitute a violation of 18 U.S.C. §§ 1341, 1343, 1344, or 1348; any rule or regulation of the Securities and Exchange Commission; or any provision of Federal law and such a violation would relate to fraud against shareholders of the public company?"

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JACKIE HOSANG LAWSON, Plaintiff, v. FMR LLC, dba FIDELITY INVESTMENTS; FMR CORP., dba FIDELITY INVESTMENTS; and FIDELITY BROKERAGE SERVICES, LLC, dba FIDELITY INVESTMENTS, Defendants.	CIVIL ACTION NO. 08-10466-DPW
JONATHAN M. ZANG, Plaintiff, v. FIDELITY MANAGEMENT & RESEARCH COMPANY, FMR CO., INC., and FMR LLC f/k/a FMR CORP., Defendants.	CIVIL ACTION NO. 08-10758-DPW

MEMORANDUM AND ORDER
March 31, 2010

This Memorandum addresses motions to dismiss in two separate cases alleging unlawful retaliation against employees of nonpublic companies in the mutual fund industry who complained of improper business activities by their employers. Because the cases

share a common defendant, FMR LLC, and both raise the question of the reach of the Corporate and Criminal Fraud Accountability Act of 2002, also known as the Sarbanes-Oxley Act ("SOX"), I address them jointly. In particular, the plaintiffs in both cases seek the protection of Section 806, the SOX whistleblower provision, administered through the Occupational Safety and Health Administration ("OSHA") of the Department of Labor ("DOL"). 18 U.S.C. § 1514A.

In the first case (No. 08-10466), Jackie Hosang Lawson seeks relief against her former employers, FMR LLC, FMR Corp. and Fidelity Brokerage Services, LLC (collectively "Fidelity Investments"). Lawson's employment at Fidelity Investments ended in September 2007, when she concluded she had no choice but to tender her resignation.

In the second case (No. 08-10758), Jonathan M. Zang seeks relief against his former employers, Fidelity Management & Research Company, FMR Co., Inc. and FMR LLC (collectively "Fidelity Management"). Zang worked for Fidelity Management from 1997 until July 2005, when his employment was terminated.

Both Fidelity Investments and Fidelity Management have moved to dismiss the cases pursuant to Fed. R. Civ. P. 12(b)(6).

I. FACTUAL BACKGROUND

In summarizing the factual background of this litigation, I take all well-pleaded facts contained in the Complaints as true, and I draw all reasonable inferences in the Plaintiffs' favor. *In re Citigroup, Inc.*, 535 F.3d 45, 52 (1st Cir. 2008). These facts "may be derived from the complaint, from documents annexed to or fairly incorporated in it, and from matters susceptible to judicial notice." *Warren Freedenfeld Assocs., Inc. v. McTigue,* 531 F.3d 38, 44 (1st Cir. 2008). A court is entitled, however, to disregard "bald assertions, unsupportable conclusions, and opprobrious epithets." *In re Citigroup,* 535 F.3d at 52 (quoting *Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 4 (1st Cir. 2007)).

A. Lawson's Claims

1. The Parties

The Defendants in Lawson's suit are three privately held companies involved in the business of mutual fund investments. Defendant FMR LLC is the successor to Defendant FMR Corp., and Defendant Fidelity Brokerage Services, LLC ("Fidelity Brokerage") is its subsidiary.[1] Together they conduct business under the name "Fidelity Investments." Their

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[1] Lawson names FMR Corp. as a defendant, but according to her Amended Complaint (as well as the Defendants' Memorandum for its Motion to Dismiss) FMR Corp. has been merged into FMR LLC.

business, according to Lawson, includes acting as investment advisers to the Fidelity family of mutual funds ("Funds"), which are separate investment companies under the Investment Company Act of 1940, 15 U.S.C. § 80a-3(a)(1). The Funds, which are publicly held companies, have no employees, but are rather overseen by a single Board of Trustees.

Fidelity Management & Research Company ("FMR Co."), not named as a defendant in Lawson's suit, is a subsidiary of FMR Corp. and/or FMR LLC. FMR Co. serves as the registered investment adviser to the Funds under 15 U.S.C. § 80b-2(a)(11). FMR Co. provides services pursuant to a written contract approved by the Fund's Board of Trustees. Before approving these contracts, the Board of Trustees reviews the financial data and methodologies that determine the Funds' profitability, as provided by FMR LLC and its subsidiaries.

Lawson began working at Fidelity Investments in 1993 as a contract employee. She became a full-time employee in 1996, and was promoted to Director of Finance in 1999. In 2001, she was promoted to Senior Director of Finance. Her specific employer until 2007 was Fidelity Brokerage.

2. Alleged Protected Activities and Retaliation

a. Protected Activities

From the face of the Complaint, it is not readily apparent precisely which activities Lawson alleges to

be "protected" for purposes of SOX or the common law. Her brief in Opposition to the Motion to Dismiss, however, identifies seven categories of protected activities.

First, she reported inaccuracies in the expenses for "Guidance Interactions," a new initiative to give investment advice to the public. She provided information about these inaccuracies to Fidelity Investments' counsel and CFO, as well as to Vice President Betty Connolly, in June 2007.

Second, she reported the improper retention of 12b-1[2] fees to Fidelity Investments General Counsel in May 2007.

Third, she challenged the methodology used by PI Finance, a group within Personal Investments, one of the three main companies in Fidelity Brokerage. In May 2007, she reported to Fidelity Investments General Counsel that stale methodology generated variances and discrepancies for the Funds, which affected Fund Profitability models.

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[2] The term "12b-1 fees" refers to fees governed by SEC Rule 12b.1, 17 C.F.R. § 270.12b-1(b), promulgated pursuant to the Investment Company Act of 1940. If a mutual fund adviser plans to use fund assets to make payments for the marketing and distribution of fund shares, then it must comply with the specific conditions laid out in Rule 12b.1(b). Lawson's general concern appears to have been that National Financial ("NF"), a group within Fidelity Brokerage, was improperly retaining fees paid by the Funds that were designated for transferral to third-party intermediaries.

Fourth, she raised questions regarding PI Finance's switch of source system. She alleges that in March 2005, she advised her manager of discrepancies that had resulted from the use of a new source system, and that the switch to the new system had not been disclosed to or approved by the Board of Trustees.

Fifth, she questioned a methodology for allocating internet expenses. In the summer of 2005, Lawson presented findings to Senior Vice President Harris Komishane and then to Vice President of PI Finance John Cahill that PI Finance had failed to implement the methodology for this allocation, which the Board had approved in 2003.

Sixth, she reported two major errors in a methodology applied to the PI Back Office Group, which services shareholders' accounts. She reported the errors to Komishane.

Seventh, she filed complaints with OSHA.

b. Retaliation

The retaliation allegedly suffered by Lawson consists of a series of events: reduction of her performance rating from "exceeds expectation" to "proficient;" selection of another person instead of Lawson for the position of Director of the Board Support Group; charges that Lawson had failed to prepare business partners properly for a meeting with PricewaterhouseCoopers; reduction in bonus compensation;

exclusion from committee meetings regarding her OSHA complaints; denial of approval of an expense report; implication that she was involved in the improper 12b-1 fee retention; an "oral warning" for violating Fidelity Investments rules on insubordination; a statement by a supervisor that it was impossible for Lawson to continue working at Fidelity Investments; and harassing behavior by supervisor Claire Cadogan, including verbal abuse, sabotage of her work, and the imposition of an unrealistic workload.

3. Procedural History

Lawson filed SOX whistleblower complaints with OSHA on four separate dates: December 20, 2006; April 24, 2007; September 14, 2007; and November 9, 2007. In a letter on January 28, 2008, the DOL consolidated the four complaints into one. Lawson alleged unlawful retaliation in violation of the SOX provision which makes it unlawful for certain persons and entities to penalize employees for providing information about or assisting an investigation that employees reasonably believe constitute violations of 18 U.S.C. §§ 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission ("SEC"), or any federal law relating to shareholder fraud. 18 U.S.C. § 1514A(a)(1).

On January 3, 2008, Lawson notified the DOL that she intended to seek review in federal court of her SOX claim. Under SOX, if the DOL has not issued

a final decision on the complaint within 180 days of filing, the claimant may seek de novo review in federal district court. 18 U.S.C. § 1514A(b)(1)(B). The DOL, in its January 28 letter, notified Lawson that over 180 days had passed since she filed her first complaint, and that because of her intention to seek de novo review in federal court, the consolidated complaint before the DOL was closed. The Plaintiff filed her Complaint in this Court on March 20, 2008. After a scheduling conference for this litigation, Lawson filed the Amended Complaint on September 19, 2008, to which the Defendants have responded with the instant Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

B. Zang's Claims

1. The Parties

The Defendants in Zang's suit, here collectively referred to as Fidelity Management, are privately owned companies whose operations include the management of mutual funds. Defendant FMR LLC is the parent company of Defendant Fidelity Management & Research Company, which itself is the parent of Defendant FMR Co., Inc. As noted, FMR LLC is the successor to FMR Corp. These companies provide investment management services to a group of mutual funds ("Funds"), each of which is a publicly held investment company, registered with the SEC and required to file reports under Section 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(d). A

Board of Trustees has oversight capacity for the Funds, but the Defendants perform the management and administrative functions necessary for the Funds' operation. Together, the Defendants manage approximately 350 mutual funds.

The Plaintiff began his employment for Fidelity Management in 1997. Under Zang's employment agreement, he was employed "by FMR Corp., and/or any entity which is directly or indirectly owned or controlled wholly or in part by FMR Corp." In 2001, Zang's specific employer changed from Fidelity Management & Research Company to FMR Co., Inc., and remained so until his employment was terminated in 2005.

Zang started at Fidelity Management as an equity research analyst in 1997. Between 1998 and 2005, Zang acted as a portfolio manager for several mutual funds: Fidelity Select Utilities Growth, Fidelity Select Chemicals, Fidelity Select Medical Delivery, and Fidelity Select Natural Gas. His portfolio manager duties included selecting the investment securities for the fund, communicating with outside parties about performance and investment strategies, and helping prepare or review certain shareholder reports and disclosures. During this period, Zang received positive feedback from trade publications and his superiors.

2. Alleged Protected Activity and Retaliation

a. Protected Activity

In February 2005, Fidelity Management internally distributed, and sent to the SEC, a draft of the revised registration statement for Fidelity Select Portfolios. Included with this statement was a revised Statement of Additional Information ("SAI"), which was to become effective in April. Zang contends he informed Fidelity Management that the SAI disclosures failed to state accurately the extent to which portfolio managers' compensation was driven by performance as research analysts providing services to other Fidelity mutual funds, rather than by performance as portfolio managers of their respective Select Funds. Zang's Complaint identifies several securities laws that he claims he reasonably believed were violated in the SAI, including Section 17(a) of the Securities Act of 1933, and Sections 15(c), 34(b), and 36(b) of the Investment Company Act of 1940. Zang further alleges that he informed Fidelity Management that its operation of the Funds created conflicts of interest that harmed the Funds' shareholders.

b. Retaliation

Zang contends that as a result of his protected activities, a Fidelity Management supervisor withdrew direction that Zang attend a Board of Trustees meeting for the Fidelity Select Medical Delivery fund.

Zang also refers to supervisor complaints of poor job performance as retaliation for his protected activities. At one point, a supervisor also informed Zang that Fidelity Management was unsure whether it wanted Zang to be a member of "the team," despite his performance during this period that outpaced other Fidelity Select fund managers.

On June 27, 2005, Fidelity Management terminated Zang's employment effective July 15. On June 30, 2005, Fidelity Management offered Zang six months of severance pay, but later rescinded the severance offer. At the same time it terminated Zang, Fidelity Management terminated the employment of two other portfolio managers, allegedly as a result of the same review that led to Zang's termination. Zang claims that these two portfolio managers, unlike him, received severance pay.

3. Procedural History

Zang filed a complaint with OSHA on September 15, 2005. The complaint alleged that the Defendants violated the SOX whistleblower provision when they discharged Zang in July 2005 as unlawful retaliation for activity protected under the statute.

OSHA dismissed the complaint, finding that although Zang was a covered employee within the meaning of the SOX whistleblower provision, 18 U.S.C. § 1514A(a), he had not engaged in protected conduct. Zang requested a hearing before an Administrative Law Judge ("ALJ"). Fidelity Management then filed a

motion for summary decision on April 3, 2007, alleging that Zang was not a covered employee within the meaning of § 1514A(a), and that Zang had not engaged in protected conduct within the meaning of § 1514A(a)(1). The ALJ permitted limited discovery concerning Zang's status as a covered employee, and on March 27, 2008, issued a decision granting summary decision to Fidelity Management, and dismissing the complaint. On April 9, 2008, Zang petitioned for review of the ALJ decision by the Department of Labor's Administrative Review Board ("ARB"). However, on April 16, 2008, Zang gave notice of his intention to file an action in federal court, and proceeded to file his Complaint in this Court on May 6, 2008, thereby terminating his appeal with the ARB. The Defendants thereupon filed the Motion to Dismiss Zang's Complaint now before me.

II. STANDARD OF REVIEW

To survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a complaint must allege "a plausible entitlement to relief." *Gargano v. Liberty Int'l Underwriters, Inc.*, 572 F.3d 45, 49 (1st Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1966 (2007)). On a motion to dismiss, a court examines the record "accepting the complaint's well-pleaded facts as true and indulging all reasonable inferences in the plaintiff's favor." *Cook v. Gates*, 528 F.3d 42, 48 (1st Cir. 2008) (citing *SFW Arecibo, Ltd. v. Rodriguez*, 415 F.3d 135, 138-39 (1st Cir. 2005)).

III. ANALYSIS

Both sets of Defendants contend that the two claims in the Plaintiffs' respective Complaints-retaliation in violation of 18 U.S.C. § 1514A (Count I) and wrongful discharge in violation of public policy (Count II) – fail to state a claim upon which relief can be granted. Before turning to the Defendants' challenge based on the scope of SOX's whistleblower provision, I address at the outset a threshold challenge raised by Fidelity Management with respect to Zang's claim: that the claim is barred by the principles of collateral estoppel.

A. Is Zang Collaterally Estopped from Pursuing His Claim in Federal Court?

The vitality of Zang's SOX whistleblower claim depends on whether the principles of collateral estoppel apply to the March 27, 2008 decision by the DOL's ALJ. The procedures at issue are defined in 18 U.S.C. § 1514A(b). A claimant may bring an action for de novo review in federal district court "if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant." § 1514A(b)(1)(B). The parties dispute whether the statute permits an ALJ decision to have preclusive effect when a claimant has received an adverse ALJ decision, then appeals the decision to the ARB, and then immediately exercises his rights of de novo district court review.

The test for collateral estoppel, or issue preclusion, has four elements: (1) both proceedings involved the same issue of law or fact; (2) the issue was actually litigated in the prior proceeding; (3) the issue was resolved in a final and binding judgment; and (4) the first court's resolution of that issue was essential to its judgment. *Monarch Life Ins. Co. v. Ropes & Gray,* 65 F.3d 973, 978 (1st Cir. 1995).

When a prior judgment issues from an administrative agency, the default assumption is that issue preclusion applies to the agency judgment. *Global NAPs, Inc. v. Mass. Dep't of Telecomm. & Energy,* 427 F.3d 34, 44 (1st Cir. 2005). The Supreme Court will give preclusive effect to administrative agency decisions. *Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 103, 107 (1991) ("We have long favored application of the common-law doctrines of collateral estoppel . . . to those determinations of administrative bodies that have attained finality."); *Univ. of Tenn. v. Elliott,* 478 U.S. 788, 797 (1986) (noting the "sound policy" of applying issue preclusion to the factfinding of administrative bodies "acting in a judicial capacity"); *United States v. Utah Constr. & Mining Co.,* 384 U.S. 394, 422 (1966) (holding that when an agency acts in a judicial capacity, giving parties an opportunity to litigate and resolving disputed issues of fact, the courts apply preclusion to the case). The values behind collateral estoppel – avoiding costs of repetitive litigation and conserving judicial resources – apply whether the prior factfinding was made by a state or federal agency. *Elliott,* 478 U.S. at 798.

Before applying this "federal common law of issue preclusion," however, there is a preliminary question: whether issue preclusion is inconsistent with the statute under which the claimant seeks relief. *Global NAPs,* 427 F.3d at 45 (citing *Elliott,* 478 U.S. at 796); *see also Astoria,* 501 U.S. at 108 ("[W]here a common-law principle is well established, as are the rules of preclusion, . . . the principle will apply except 'when a statutory purpose to the contrary is evident.'") (citation omitted). The framework for this analysis comes from *Elliott,* 478 U.S. 788, which involved collateral estoppel against the backdrop of Title VII. In *Elliott,* a state ALJ had determined that the University of Tennessee was not motivated by racial prejudice when it discharged the claimant. *Id.* at 791. The employee did not seek review of that decision in state court, but instead filed a new suit in federal court for violations of Title VII and 42 U.S.C. § 1983. *Id.* at 792. The Supreme Court interpreted Title VII to permit de novo review in federal court, reasoning that if under the statute, the Equal Employment Opportunity Commission ("EEOC") had authority to investigate charges previously reviewed by state and local authorities, so too did a district court. *Id.* at 795.

The First Circuit has observed "*Elliott* controls the structure of the analysis" in this context. *Global NAPs,* 427 F.3d at 45. Just as the Court in *Elliott* was required to determine whether Title VII permitted giving preclusive effect to unreviewed state administrative proceedings, the question here is whether the

Sarbanes-Oxley whistleblower provision permits giving preclusive effect to DOL administrative proceedings. *Id.* at 46.

Deciding if issue preclusion applies to the DOL'S ALJ decision therefore requires statutory interpretation of 18 U.S.C. § 1514A(b)(1)(B). I first turn to the text, "the starting point for interpretation of a statute." *Seahorse Marine Supplies, Inc. v. Puerto Rico Sun Oil Co.,* 295 F.3d 68, 74 (1st Cir. 2002) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno,* 494 U.S. 827, 835 (1990)). The pertinent language is that "if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant," the claimant can pursue de novo review in federal district court. § 1514A(b)(1)(B). The statute clearly identifies three necessary criteria for de novo review in federal court: the lack of a final decision by the DOL; a 180-day waiting period after filing the complaint with the DOL; and the lack of bad faith on the part of the claimant. The DOL regulations specify several mechanisms for obtaining a final decision from the Department. The regulation relevant to this case is 29 C.F.R. § 1980.110, which deals with appeals of ALJ decisions to the ARB. The ALJ determination becomes a final decision if the claimant has *not* timely filed a petition for review with the ARB. 29 C.F.R. § 1980.110(a). The ALJ decision also becomes a final decision if the claimant has petitioned for ARB review, but the ARB has not issued an order within thirty days, notifying the parties that the case has

been accepted for review. § 1980.110(b).[3] Therefore, the ALJ decision is not a final decision if (1) a claimant has timely filed a petition for ARB review, and (2) either the thirty-day deadline has not yet elapsed and the ARB has yet to take action, or the deadline has elapsed and the ARB has timely accepted the case for review.

It is clear that in this case, Zang had not obtained a final decision from the DOL at the time he filed his case in federal court. Zang obtained the ALJ's decision on March 27, 2008, and appealed that decision to the ARB on April 9. On April 16, Zang notified the DOL that he planned to file suit in federal court and indeed did so on May 6. Because the matter was on appeal to the ARB and thirty days had not yet passed, the ALJ's decision was not a "final decision" at the time that Zang filed his complaint in federal district court. The other two requirements for seeking de novo review in federal court – a 180-day waiting period and a lack of bad faith – are also satisfied. When Zang notified the ARB of his decision to pursue relief in federal court, two and a half years had passed since Zang filed his complaint at the DOL, thereby easily satisfying the 180-day waiting

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[3] The regulations identify two other ways in which a determination becomes a final decision. OSHA's preliminary findings become a final decision if the claimant does not make a timely objection to these findings or the preliminary order. 29 C.F.R. § 1980.106(b)(2). If the ARB has accepted the case for review, then its determination on the merits of the case, once made, is the final decision of the Department. § 1980.110(a).

requirement. Nor do the Defendants argue that the 180-day delay resulted from bad faith on Zang's part. Here, all three of the statute's requirements, according to the plain terms of the text, had been satisfied.

A statute's plain meaning governs "unless it would produce an absurd result or one manifestly at odds with the statute's intended effect." *Seahorse Marine Supplies,* 295 F.3d at 74 (quoting *Parisi by Cooney v. Chater,* 69 F.3d 614, 617 (1st Cir. 1995)); *see also Griffin v. Oceanic Contractors,* 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with legislative purpose are available."). The Defendants suggest that allowing Zang to proceed would produce an absurd result that is inconsistent with the administrative dispute resolution procedures anticipated by the statute.

The district court in *Hanna v. MCI Communities, Inc.,* voiced similar concerns, noting that "applying the statute according to its plain meaning might indeed lead to an absurd result" in cases where a complainant files a complaint in federal court after petitioning for review by the ARB. 348 F. Supp. 2d 1322, 1329 (S.D. Fla. 2004). The Department of Labor has expressed similar concerns:

> This provision authorizing a Federal court complaint is unique among the whistleblower statutes administered by the Secretary. This statutory structure creates the possibility that a complainant will have litigated a

> claim before the agency, will receive a decision from an administrative law judge, and will then file a complaint in Federal court while the case is pending on review by the Board.

68 Fed. Reg. 31,860, 31,863 (May 28, 2003). From this, the Department of Labor concludes "that it would be a waste of the resources of the parties, the Department, and the courts for complainants to pursue duplicative litigation." *Id.*

I do not agree with these somewhat overwrought observations by *Hanna* and the Secretary of Labor that relitigating the issue in district court is either absurd or improperly duplicative. *See Stone v. Instrumentation Lab. Co.*, 591 F.3d 239, 249 (4th Cir. 2009) (finding "a literal interpretation of the statute [§ 1514A] does not lead to an 'absurd result'" and "reject[ing] as contrary to the statute the Secretary's 'suggestion' that district courts apply preclusion principles to effectuate a goal of efficiency."). The statute provides a mechanism for administrative proceedings. If the DOL cannot complete the adjudication process in a timely fashion – within 180 days – claimants can either seek review in federal court, or can first pursue further administrative review. To be sure, this may lead to duplication of factfinding by the DOL and the federal courts, but that repetition was clearly contemplated as possible by the statute's general provision for "de novo review." *See id.* at 250 (rejecting "the Secretary's interpretation and invitation to district courts to apply preclusion principles

because Congress expressly provided for *de novo* non-deferential review in district court"). And of course, it is entirely within the DOL's control to preclude a claimant from filing in federal court and to avoid the duplication of factfinding – namely, by issuing a final decision within 180 days of the filing of the complaint.

Any charges of absurdity are further undermined when one considers similar outcomes under other federal statutes. In the employment context, if 180 days have passed since an employee has filed a discrimination charge with the EEOC, and the EEOC has yet to file a civil action, then the employee can seek de novo review in federal district court. 42 U.S.C. § 2000e-5(f)(1). Likewise, a federal employee whose discrimination case has been reviewed by the Merit Systems Protection Board can obtain review in federal district court. 5 U.S.C. §§ 7702, 7703(b)(2). Outside the employment context, a claimant can seek de novo review of a revocation of a federal firearms license by the Bureau of Alcohol, Tobacco, Firearms and Explosives, where the Attorney General has affirmed the revocation after a hearing. 18 U.S.C. § 923(f)(3). The same opportunity is provided if a naturalization application is denied, and a senior immigration examiner upholds the denial after an administrative hearing. 8 U.S.C. § 1421(c).

In light of these statutes, the text of SOX, and the DOL's own procedural mechanisms, I find that it would not be absurd to permit Zang to proceed

with his federal claim. A necessary requirement of collateral estoppel is that the adjudication body "actually resolved the issue in a final and binding judgment." *Monarch Life Ins.*, 65 F.3d at 978. The ALJ determination here was on appeal for review by the ARB, and therefore his decision dismissing the Plaintiff's complaint was not final. I therefore conclude that for the purposes of § 1514A(b), the principles of collateral estoppel do not apply to ALJ decisions when those decisions are on appeal to the ARB and more than 180 days have passed since the initial filing of the complaint with the Department.

B. Were Lawson and Zang Covered Employees Under the Sarbanes-Oxley Act?

The Defendants contend that Lawson and Zang, as employees of privately held companies, are not covered by the SOX whistleblower provision. For their part, Lawson and Zang argue that the statute encompasses not only employees of public companies but also employees of private companies, particularly those that act as investment advisers to public investment companies. Resolution of this dispute requires interpretation of § 1514A(a), and again I begin with the text.

1. The Text of § 1514A(a)

The whistleblower provision identifies both employers whose retaliation is prohibited and employees

whose conduct is protected. The subsection in question states as follows:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)), or **any officer, employee, contractor, subcontractor, or agent of such company,** may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against **an employee** in the terms and conditions of employment because of any lawful act done by the employee –
>
> > (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by –
> >
> > > (A) a Federal regulatory or law enforcement agency;
> > >
> > > (B) any Member of Congress or any committee of Congress; or
> > >
> > > (C) a person with supervisory authority over the employee (or

> such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
>
> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

§ 1514A(a) (emphasis added). The parties do not dispute that "an employee" includes an employee of a public company, i.e., one with a class of securities registered under Section 12 of the Securities Exchange Act or one that files reports with the SEC. But the Plaintiffs argue that "an employee" also includes employees of "any officer, employee, contractor, subcontractor, or agent of such company."

The statutory text is far from pellucid.[4] The statute protects "an employee," but does not directly state

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[4] Courts as well as commentators have criticized SOX as "hastily passed and poorly drafted." *In re Enron Corp. Sec. Litig.*, No. MDL-1446, 2004 WL 405886, at *11 (S.D. Tex. Feb. 25, 2004); *In re Adelphia Comm'cns Corp.*, No. 03-MD-1529, 2005 WL 1278544, at *5 n. 8 (S.D.N.Y. May 31, 2005); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance,* 11 YALE L.J. 1521, 1549-68 (2005) (discussing the narrow time frame in which the legislation was

(Continued on following page)

at which entity the individual must be employed. I therefore interpret the word "employee" by reference to the rest of the language in the subsection. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (describing the doctrine of *nascitur a sociis*, whereby a word is known by the words with which it is associated). This requires choosing between two interpretations: the Defendants' reading ("an employee of a publicly traded company"), or a more expansive reading ("an employee of a publicly traded company or of any officer, employee, contractor, subcontractor, or agent of such company"). The Plaintiffs contend that the statute uses broad, plain language protecting an employee without regard to whether he is employed by the public company or the contractor. Fidelity

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developed); Michael A. Perino, *Enron's Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002*, 76 ST. JOHN'S L.REV. 671, 672 (2002) (observing that speedy drafting resulted in a disorganized statute). *But see SEC v. Worldcom, Inc.*, No. 02 Civ 4963(JSR), 2003 WL 22004827, at *17 & n. 43 (S.D.N.Y. Aug. 26, 2003) ("While Sarbanes-Oxley has been criticized in some quarters, there can be no doubt that it addresses some of the very problems presented by this Company's history. . . . As with other major legislation covering significant new territory, there are provisions of Sarbanes-Oxley that will benefit from either clarifying regulations or from exemptive actions.").

For instance, ambiguity has emerged as to the statute of limitations in Section 804, *Lieberman v. Cambridge Partners, LLC*, 432 F.3d 482, 489 (3d Cir. 2005), and as to the statute's retroactive application. *In re ADC Telecomms., Inc. Sec. Litig.*, 409 F.3d 974, 977 (8th Cir. 2005) (concluding that a "literal reading of the Sarbanes-Oxley Act's effective-date clause would lead to a puzzling result").

Investments has suggested that such a construction is linguistically nonsensical because it would require the words "any officer, employee, contractor, subcontractor, or agent" to serve two functions: subject (those who cannot discriminate) and object (those who cannot be discriminated against). This attempt at a grammatical attack is not persuasive. Under the Plaintiffs' construction, the subject and object of the sentence would be distinct groups: the subject would be a "publicly held company" or its "officer, employee, contractor, subcontractor, or agent," while the object of the sentence would be the "employee" of one of these discriminating entities. While the entities in the former group perform two conceptual functions – as discriminating entities, and as employers of protected individuals – this does not mean they serve two *grammatical* functions.[5]

I next consider whether either interpretation makes better logical sense. The statute contains a list of potential defendants (a public company, officer, employee, etc.), a list of prohibited actions (discharge, demotion, suspension, threat, harassment, discrimination), and a definition of the covered employees (employed by either a public company, or a public

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[5] I note further that even if the Defendants' grammatical argument were persuasive, it would be equally damaging to the Defendants' own construction – "employee of a public company." Under this reading, "public company" would refer both to the subject of the sentence, as the discriminating entity, and to the employer of the protected individual.

company and its related entities, depending on one's reading of the statute). Such variables create a web of potential relationships between the public company, the entities acting on the company's behalf, the conduct involved, and the employees protected by the statute.

Given this potential complexity, I find that both of the opposing interpretations suggest somewhat awkward applications to various business relationships. For example, under the Plaintiffs' reading, the statute would protect an *employee of an employee* of a public company, and an *employee of an officer* of a public company. Fidelity Investments suggests that it would be nonsensical for a public company's officers or employees also to have their own employees. This suggestion perhaps overstates the feasibility of such an arrangement; one could imagine, for example, an officer or employee of a public company with a personal assistant, not employed by the public company, who has access to information about potential corporate fraud. Nevertheless, Fidelity Investments is correct that the statute's suggestion of the potential for such convoluted arrangements should give one pause in fashioning a manageable definition when construing the statute.

On the other hand, the Defendants' own proffered construction also has a puzzling application. Under this reading of the statute, no contractor or subcontractor is permitted to "discharge, demote, [or] suspend" an employee of a public company. It is difficult to think of circumstances that would, in any event,

enable a subcontractor to discharge, demote, or suspend the employee of a public company, an entity with presumably no direct relationship to the very subcontractor executing the discharge.

Under either construction, then, few circumstances would permit all of the potential defendants to be capable of engaging in all of the prohibited activities against the covered employees. One should not conclude from the potential for awkward applications that either opposing construction should be rejected. Rather, one can conceive that under the statute, at least one prohibited activity and one category of covered employees – but not necessarily all activities and covered employees – correspond to at least one of the potential defendant entities.

Given their comparable feasibility as grammatical and logical constructions, neither of the opposing interpretations can be ruled out. Decisional law has done little to enlighten the issue. In *Rao v. Daimler Chrysler Corp.*, No. 06-13723, 2007 WL 1424220 (E.D. Mich. May 14, 2007), the plaintiff was an employee of a private company that was a "thrice-removed" subsidiary of a public company. *Id.* at *1. The court made reference to the political backdrop of the enactment of SOX and speculated that Congress's widespread concerns about accounting fraud might suggest "the inclusion of a public company's subsidiaries within SOX's whistleblower protection provision." *Id.* at *4. In the end, however, the *Rao* court concluded it could not escape the text of the statute: "[T]he fact remains that Congress only listed employees of public

companies as protected individuals under § 1514A, and it is not the job of this Court to rewrite clear statutory text." *Id.* The *Rao* holding is not itself without ambiguities. Early in the opinion, the court offered as a summary that "employees of entities with certain relationships to publicly traded companies, including agents of such companies, receive whistleblower protection under § 1514A as well."[6] *Id.* at *3.

A narrow reading of the proper scope of Section 806 is shared by other federal district courts and is found in DOL administrative decisions.

In *Brady v. Calyon Sec. (USA) Inc.*, 406 F. Supp. 2d 307, 318 (S.D.N.Y. 2005), the court found that § 1514A did not cover an employee of a privately held broker-dealer that allegedly acted as an "agent and/or underwriter" for public companies. The court held that "as an employee of non-publicly traded companies, Brady [the employee] is not covered by Sarbanes-Oxley." *Id.* at 319. "Nothing in the Act

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[6] The issue was raised but not decided by the First Circuit in *Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir. 2006). *Carnero* involved an employee of a private company, which was a subsidiary of a publicly held corporation. *Id.* at 2. The issue on appeal was whether Section 806 of SOX had extraterritorial effect, but the court briefly discussed its applicability to employees of privately held subsidiaries. "An individual complaining under this section of the Act must . . ordinarily be . . an 'employee' of a publicly traded company subject to the Act." *Id.* at 5. However, because neither party contested the plaintiff's status as a covered employee, the First Circuit merely assumed his covered status without deciding the issue. *Id.* at 6.

suggests that it is intended to provide general whistleblower protection to the employees of any employer whose business involves acting in the interests of public companies." *Id.* at 318; *see also Malin v. Siemens Med. Solutions Health Servs.*, 638 F. Supp. 2d 492, 500-01 (D. Md. 2008) ("[T]o hold that non-public subsidiaries are subject to the whistleblower protection provisions simply because their parent company is required by other SOX provisions to report the subsidiary's financial information or to adopt an umbrella compliance policy would widen the scope of the whistleblower protection provisions beyond what Congress appears to have intended."). In a footnote, the *Brady* court cites DOL ALJ opinions it considered to illustrate the "proper application" of the "agency" provision, focusing on those involving non-public companies that direct and control the employment decisions for the public company. *See id.* at 318 n.6.

ALJs within the Department of Labor who have addressed this issue have reached similar conclusions. In *Goodman v. Decisive Analytics Corp.*, No. 2006-SOX-11 (ALJ Jan. 10, 2006), the ALJ determined that limiting whistleblower protection to employees of publicly traded companies was necessary in order to limit the scope of Section 806: "Any other interpretation would extend SOX employee protection far beyond the applicability envisioned by Congress since any private business conducting any contractual transaction with a publicly traded company would be subject to SOX employee protection provisions." *Id.* at 6. In *Zang v. Fidelity Mgmt. & Research*

Co., No. 2007-SOX-00027 (ALJ Mar. 28, 2008), involving the Plaintiff in this case, the ALJ concluded in a decision I have found does not have preclusive effect, *see* Section III.A. *supra,* that "[h]ad Congress intended such an expansive application of Sarbanes-Oxley's whistleblower provision it would have plainly said as much." *Id.* at 7-8; *see also Minkina v. Affiliated Physician's Group,* No. 2005-SOX-00019, at 6 (ALJ Feb. 22, 2005) (concluding that nothing in the statute's language or legislative history suggests that Congress intended to bring the employees of non-public entities under the protection of Section 806).

The ARB of DOL has yet to provide the ALJs with definitive clarification on these matters. In *Kukucka v. Belfort Instrument Co.,* No. 06-104 (ARB Apr. 30, 2008), the claimant's employer, Belfort, was a private company that Kukucka argued was reliant on SunTrust, a publicly traded bank. The ARB stated that "[b]y its terms the SOX provides protection against retaliation only to employees of [public] companies." *Id.* at 4. But when the ARB ultimately dismissed Kukucka's claim, it did so not because Kukucka failed to show that his employer was a public company, but rather because he "offered no evidence to the ALJ that [Belfort's reliance on the public company] was equivalent to being a contractor, subcontractor, or agent of SunTrust." *Id.*

In another ARB case, *Klopfenstein v. PCC Flow Techs. Holdings, Inc.,* No. 04-149 (ARB May 31, 2006), the employee-claimant worked for a company that was a subsidiary (several times removed) of a

publicly traded company. *Id.* at 2. The ARB decided that an employee of a subsidiary, acting as an agent of a publicly traded company, could be protected from retaliatory actions by the subsidiary. *Id.* at 9. The *Klopfenstein* decision turned on agency theory, and involved the complex task of identifying at what point a far-removed subsidiary becomes the agent of its parent corporation. Nevertheless, underlying this analysis in *Klopfenstein* was the assumption that if a subsidiary is indeed acting as an "agent," then the subsidiary's employees are covered by Section 806. The ARB does not explain the reason for making this assumption, and engages in no analysis of the statute's language or purpose with respect to which categories of employees are covered. This omission leaves me with little reason to find this particular analysis persuasive.

These opinions have engaged in little thorough discussion of the text of the statute and the different meanings that the word "employee" could bear. Left with the plain text of the statute, I find that the meaning of "employee" in § 1514A(a) is ambiguous. I therefore turn to other considerations to provide further guidance.

2. The Title and Other SOX Provisions

I approach cautiously Defendants' argument that the provision's title, "Whistleblower Protection for Employees of Publicly Traded Companies," 18 U.S.C. § 1514A, supports their position. According to the

Defendants, the title is evidence that "an employee" is limited exclusively to employees of publicly traded companies. A statutory heading, however, is "but a short-hand reference to the general subject matter involved." *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528 (1947). The heading of the whistleblower provision could conceivably also act as shorthand for more complicated clauses and concepts in the statute's actual text. A section heading thus "cannot limit the plain meaning of the text." *Id.* at 529. But *Brotherhood* advises that headings "are of use . . . when they shed light on some ambiguous word or phrase," and are tools "for the resolution of a doubt." *Id.* Because the phrase "an employee" only indirectly identifies the employer in question, requiring this court to engage in some grammatical reconstruction, there is arguably doubt as to the scope of the word "employee." *See Immigration & Naturalization Serv. v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) (holding that a generic reference to "employment" in the statute's main text was in fact limited to "unauthorized employment," a phrase that appeared in the provision's heading). The heading of the SOX whistleblower provision, though of limited use in statutory interpretation, adds some support to the Defendants' proposed construction.

But this support is limited. If Section 806 protected not only employees of publicly traded companies, but also employees of their related entities, it would still be reasonable to use the shorthand

"Employees of Publicly Traded Companies" in the section's heading, given that even under the Plaintiffs' reading, all protected employees would have some connection to public companies, even if indirectly. The rationale for the shorthand is even more compelling when one considers that the alternative heading would have been "Employees of Publicly Traded Companies and Their Related Entities," or worse, "Employees of Publicly Traded Companies, Their Officers, Employees, Contractors, Subcontractors, or Agents." This contrasts with *National Center for Immigrants Rights,* where the alternative heading would have merely used the relatively concise phrase "Authorized and Unauthorized Employment" rather than "Unauthorized Employment," thereby weakening any claim that the heading functioned as a mere shorthand. *See Nat'l Ctr. for Immigrants' Rights,* 502 U.S. at 189.

Another consideration is the treatment of company-related entities in other provisions of SOX. Section 307, for instance, discusses the obligation of attorneys to report evidence of a material breach of securities law or a breach of a fiduciary duty by a company or its agent. 15 U.S.C. § 7245. The provision states explicitly that these rules apply to "attorneys appearing and practicing before the Commission *in any way* in the representation of issuers." § 7245 (emphasis added). This definition could indicate that Congress was aware of how to broaden the scope of individuals affected by the statute, and chose to do so in Section 307, and did not choose to do so in Section 806.

On the other hand, one could also infer from Section 307 that Congress knew how to define the scope of the affected persons in the provision, and neglected to provide such definition – whether narrow or broad – to the scope of employees protected by Section 806. I find that the other SOX provisions provide limited insight as to the scope of Section 806.

3. Legislative History

Given the ambiguity of the text, I may turn to legislative history to shed light on the statute's meaning. *United States v. Commonwealth Energy Sys. & Subsidiary Cos.*, 235 F.3d 11, 16 (1st Cir. 2000). But the legislative history on this provision of SOX is notably unhelpful in answering the particular question before me because the congressional debates do not speak directly to whether employees of privately held companies can be covered by the whistleblower provision.

For instance, the Senate Judiciary Committee's Report on Sarbanes-Oxley states that Section 806 "would provide whistleblower protection to employees of publicly traded companies." S. REP. NO. 107-146, at *13 (2002). It is unclear whether this constitutes a statement that employees of non-public companies are specifically excluded, or are instead limited shorthand generalizations about Section 806. Similarly, in Senator Sarbanes's introduction to the Senate Conference Report, he stated that the Act "applies exclusively to public companies," *see* 148 Cong. Rec. S7350,

7351 (July 25, 2002) which could mean that it applies to public companies and those parties that act on their behalf (such as officers, employees, and contractors), rather than to private companies that provide no services to public companies at all.

The Senate Report also describes the consequences that would occur "[i]f the *employer* does take illegal action in retaliation for lawful and protected conduct." S. REP. NO. 107-140 at *13 (emphasis added). If the Defendants are correct that Section 806 protects only employees of publicly traded companies, then the term "employer" here must refer exclusively to publicly traded companies. The status of other non-public entities as *employers* would be irrelevant because as their actions against their own employees would not be covered. But it then becomes unclear why the Report's language would use the term "employer" at all, given that the other non-public entities – even though not acting as employers – are also prohibited from engaging in retaliatory conduct.

In short, the particular phrases used in the legislative history of Section 806 provide little guidance on the scope of the covered employees.[7] What is

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[7] The Defendants also make reference to a piece of legislation that never became law, the Mutual Fund Reform Act, S. 2059, 108th Cong. § 116(b) (2004). This bill, which would have extended whistleblower protection to employees of investment advisers explicitly, provides no reliable guidance here. *United States v. Craft*, 535 U.S. 274, 287 (2002) ("[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute. . . .").

helpful, however, is evaluating the purpose of Sarbanes-Oxley more generally, which was "to prevent and punish corporate fraud, protect the victims of such fraud, preserve evidence of such fraud and crime, and hold wrongdoers accountable for their actions." S. REP. NO. 107-146, at *1 (2002). The fraud targeted by the statute was fraud involving public companies. *Id.* at *10 ("Congress must act now to restore confidence in the integrity of the public markets. . . ."). When Senator Sarbanes stated that the provision "applies exclusively to public companies," he may not have shed light on the definition of "employee," but he did indicate the focus of the statute, including Section 806. 148 Cong. Rec. S7350, 7351 (July 25, 2002).

When considering whether a particular interpretation of Section 806 leads to any problematic application that would run counter to this purpose, I find that the two interpretations diverge. The Plaintiffs' reading might permit the SOX whistleblower provision to have a notably expansive scope untethered to the purpose of the statute. Any employee of an entity that acts as an officer, employee, contractor, subcontractor or agent of a public company, who involves himself in the reporting of fraud by his own employer, would be a covered employee. This reading suggests that an employee could be protected even when his whistleblowing does not directly involve fraud against public shareholders. The Plaintiffs maintain that this application would be narrowed by the fact that Section 806 only protects those whistleblowing activities directed to the protection of shareholder interests.

But the language of the statute itself does not plainly provide such a limiting principle, cabining its scope in the manner suggested by the Plaintiffs.

The only possible limitation I can find is in the phrase "relating to fraud against shareholders." The statute protects employees who report activities that may constitute "a violation of [18 U.S.C.] section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law **relating to fraud against shareholders**. . . ." 18 U.S.C. § 1514(a)(1) (emphasis added). There is arguably some ambiguity here as to whether "relating to fraud against shareholders" modifies (1) the phrase "any provision of federal law," or instead (2) the entire clause, "a violation of [18 U.S.C.] section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law." If the latter, then each of the six categories of possible violations would have to relate to fraud against shareholders, providing the limiting principle necessary to keep the Plaintiffs' construction from expanding beyond the purpose of SOX.

Principles of statutory construction direct courts to construe a statute such that no word is superfluous, *Duncan v. Walker*, 533 U.S. 167, 174 (2001), and to "give all language in a statute operative effect." *Morales v. Sociedad Espanola de Auxilio Mutuo y Beneficencia*, 524 F.3d 54, 59 (1st Cir. 2008). If the phrase "relating to fraud against shareholders" did not modify "any provision of Federal law," one could

argue that this would render the listing of the five other statutory and regulatory categories superfluous. After all, the statute could have protected just reasonable belief in a "violation of any federal law relating to fraud against shareholders," without citing any particular statutes or regulations.

As one district court has observed, the few courts that have asked whether the violations enumerated in § 1514A are limited by the phrase "relating to fraud against shareholders" have not been consistent. *O'Mahony v. Accenture Ltd.*, 537 F. Supp. 2d 506, 516 (S.D.N.Y. 2008) (citing cases). The court in *O'Mahony*, after a thorough discussion of the statutory text, concluded that the phrase modified only the clause "any provision of federal law." *Id.* at 517. The alternative construction, whereby the phrase would modify all six categories of statutes and regulations, violates the "doctrine of the last antecedent." *Id.* This doctrine states that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). To be sure, this is not an "absolute" rule, *id.*, but here it may prove useful if there are no countervailing indications that the phrase modifies each of the covered violations.

In the case of Section 806, however, there are in fact indications that a relation to shareholder fraud is imperative for each of the six categories of violations listed. The legislative history makes clear that Congress passed SOX to address the problems of shareholder fraud that had gone unreported in the past –

not to address any and all infractions committed by a public company or its related entities giving rise to actions under the six categories of violation. According to the Senate Report, "[a]lthough current law protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for employees of publicly traded companies who blow the whistle *on fraud and protect investors.*" *See, e.g.*, S. REP. NO. 107-146, at 19 (2002) (emphasis added).

The Fourth Circuit came to the same conclusion in *Livingston v. Wyeth, Inc.*, 520 F.3d 344 (4th Cir. 2008), when faced with the question of whether the fifth category of violations, "any rule or regulation of the Securities and Exchange Commission," had to be related to fraud in order to trigger whistleblower protection. *Id.* at 351 n.1. The court decided that even though the text of the statute was ambiguous as to which violations were modified by the phrase "relating to fraud against shareholders," the limitation had to apply to SEC rules and regulations as well:

> To conclude otherwise would absurdly allow a retaliation suit for an employee's complaints about administrative missteps or inadvertent omissions from filing statements. Moreover, the ambiguity is fully clarified by the context of the whistleblower provision in the Sarbanes-Oxley Act and by the legislative history that indicates that

> whistleblowing is protected by § 1514A when it relates to "fraud."

Id.

Likewise, I find that to come within the scope of Sox when an employee provides information about conduct that he reasonably believes constitutes a violation of the categories of law and regulations listed in 18 U.S.C. § 1514A(a)(1), this whistleblowing activity must "relat[e] to fraud against shareholders." Consequently, protecting employees of a public company's related entities would not result in an overly broad application of the statute that would be counter to the statute's purpose. I am left then with a compelling limiting principle for the Plaintiffs' reading of the statute.

The Defendants' construction, while not inconsistent with the text, would result in an excessively forced and formalistic reading. The legislative history indicates that Congress was concerned with failures to report instances of fraud against shareholders, failures not only on the part of public company employees, but also employees of those institutions working with the public company. The Senate Report, discussing the collapse of Enron, observed that "Enron apparently, *with the approval or advice of its accountants, auditors and lawyers,* used thousands of off-the-book entities to overstate corporate profits, understate corporate debts and inflate Enron's stock price." S. REP. NO. 107-146, at *2 (2002) (emphasis added). The Report goes on to state that "when

corporate employees at both Enron and Andersen attempted to report or 'blow the whistle' on fraud, but they were discouraged at nearly every turn." *Id.* at *5. The legislative history of SOX makes clear that Congress was concerned about the related entities of a public company becoming involved in performing or disguising fraudulent activity, and wanted to protect employees of such entities who attempt to report such activity.

The Defendants' strongest argument in terms of legislative purpose seems to be that the Plaintiffs' construction would extend the statute to an unbounded and vague scope of protected individuals. But because my construction of the statute protects only that whistleblowing activity that relates to fraud against shareholders, I find the Defendants' concerns unfounded.

4. DOL Regulations

Another potential source on the meaning of Section 806 is a regulation issued by OSHA defining "employee" as "an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative." 29 C.F.R. § 1980.101. In promulgating the regulation, OSHA commented that this definition of "employee" is consistent with Section 806(a) because the statute "protects the employees of

publicly traded companies as well as the employees of contractors, subcontractors, and agents of those publicly traded companies." *Procedures for the Handling of Discrimination Complaints Under Section 806,* 69 Fed. Reg. 52104, 52106 (Aug. 24, 2004).

Where a statute is ambiguous, as I have determined Section 806(a) to be, an agency's regulations may merit deference under *Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.,* 467 U.S. 837, 843-43 (1984). But to justify such deference, Congress must have delegated authority to the agency to interpret the statute, and the agency must have invoked that authority. *United States v. Mead Corp.,* 533 U.S. 218, 226-27 (2001); *Navarro v. Pfizer Corp.,* 261 F.3d 90, 99 (1st Cir. 2001).

I find no provision of SOX that delegates rulemaking authority to OSHA or the Department of Labor, although a provision of the act explicitly delegates such authority to the SEC. 15 U.S.C. § 7202(a). OSHA did not invoke any authority to interpret the statute in promulgating 29 C.F.R. § 1980.101. Moreover, OSHA summarized the rule as establishing "the procedures and time frames for the handling of discrimination complaints" under SOX. 69 Fed. Reg. 52,104, 52,104. OSHA goes on to state that "[t]hese rules are procedural in nature and are not intended to provide interpretations of the Act." *Id.* at 52,105. OSHA was apparently defining the terms used in its own regulations for the procedures involved in Section 806 complaints. OSHA's regulation and comments do not constitute an exercise of authority to

interpret the statute, and warrant no deference under *Chevron*.

If an agency's interpretation of a statute has no claim to *Chevron* deference, then it merits respect insofar as it is has the "power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Mead*, 533 U.S. at 234. The weight given to an agency's judgment "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking in control." *Skidmore*, 323 U.S. at 140.

There is little indication here of the thoroughness of OSHA's consideration of the meaning of "employee." OSHA's general approach is not a model of administrative consistency. The regulation is, after all, inconsistent with determinations made by ALJs and the ARB when applying Section 806 to particular claimants. *See, e.g., Goodman*, No. 2006-SOX-11, at 6; *Zang*, No. 2007-SOX-00027, at 7-8; *Minkina*, No. 2005-SOX-00019, at 6. I nevertheless have concluded that the reasoning underlying the interpretation is valid, given the purpose of the statute and the plausible reading of the text, *see* Part III.B.1-3 *supra*. However, OSHA's interpretation of "employee," standing alone, is not particularly persuasive under *Skidmore*, despite the fact that it is consistent with my own reading of the statute's text and purpose.

5. Application to Investment Advisers for Mutual Funds

Having determined that Section 806 protects employees of any related entity of a public company, the final step in the analysis is to determine whether Lawson and Zang fall into this category. To do so, the Plaintiffs' employer must be an "officer, employee, contractor, subcontractor, or agent," or rather, have a plausible claim to being one of these entities.

Lawson and Zang have sufficiently pleaded facts indicating that the Defendants are either contractors, subcontractors, or agents of publicly held investment companies. The Plaintiffs' employers perform a wide variety of administrative and executive tasks for the Funds, including making fundamental decisions as to how the Funds' assets will be invested. If the Funds did not have investment advisers as their agents, the only activity that could take place on the Funds' behalf would be actions taken by the Board of Trustees. Indeed, the unique relationship between mutual funds and their investment advisers has often been noted by the courts. *See Daily Income Fund v. Fox,* 464 U.S. 523 (1984); *Burks v. Lasker,* 441 U.S. 471 (1979). Mutual funds are supervised and operated by separately owned organizations, the investment advisers. *Daily Income Fund,* 464 U.S. at 536; *Burks,* 441 U.S. at 481. Because of the "potential conflicts of interest" created by this close relationship, *Daily Income Fund,* 464 U.S. at 536, Congress has imposed a fiduciary duty on investment advisers and managers with regards to compensation paid by the

investment company. 15 U.S.C. § 80a-35(b); *see Yameen v. Eaton Vance Distribs., Inc.*, 394 F. Supp. 2d 350, 354 (D. Mass. 2005). This fiduciary duty remains subject to oversight by the courts, although the particular role of the courts in the enforcement process continues to be refined, as demonstrated by the issues raised in a case decided today by the Supreme Court, *Jones v. Harris Assocs. L.P.*, 2010 WL 1189560 (U.S. March 30, 2010) *rev'g* 527 F.3d 627 (7th Cir. 2008).[8]

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[8] The question addressed by the Supreme Court in *Jones v. Harris Assocs., L.P.*, 2010 WL 1189560 (U.S. Mar. 30, 2010) is the deference owed to the decisions of a mutual fund's board regarding the level of fees paid to its investment adviser, pursuant to Section 36(b) of the ICA, 15 U.S.C. § 80a-35(b). As the competition between mutual funds has increased, some courts have become more reluctant to interfere with an investment company's compensation for investment advisers, on the assumption that market forces will help prevent advisers' fees from becoming excessive or disproportionate. *See Jones v. Harris Assocs. L.P.*, 527 F.3d 627, 633 (7th Cir. 2008) (noting that "[a] lot has happened in the last 38 years" and that the market for mutual funds is more competitive, and presumably less prone to abuse) *rev'd*, 2010 WL 1189560 (U.S. Mar. 2010). Other observers, however, have underscored the pervasive "structural impediments to arm's-length bargaining" between fund and adviser, justifying continued caution over the extent to which a fund's board becomes "captive" to the fund's investment adviser. Brief for United States as Amicus Curiae Supporting Petitioners at 12, *Jones v. Harris Assocs. L.P.*, No. 08-586 (U.S. June 15, 2009). What is clear from the Supreme Court's decision today in *Jones v. Harris Assocs. L.P.* is that courts must continue to respond to both the structural and circumstantial factors that affect the degree of independence between mutual fund and investment adviser.

These dimensions to the mutual fund industry inform my treatment of this case. For the goals of SOX to be met, contractors and subcontractors, when performing tasks essential to insuring that no fraud is committed against shareholders, must not be permitted to retaliate against whistleblowers. These concerns are especially strong for mutual funds, which have no employees and implement the funds' management through contractual arrangements with investment advisers. If Section 806 only protected employees of public companies, then any reporting of fraud involving a mutual fund's shareholders would go unprotected, for the very simple reason that no "employee" exists for this particular type of public company. I find that Lawson and Zang, as employees of investment advisers to mutual funds, are covered by Section 806.

I will briefly touch on the Plaintiffs' alternative statutory argument regarding the special status of mutual funds. Apart from the argument that investment advisers have contracts with public companies, Zang, in particular, presses "the very narrow argument that investment advisers and sub-advisers to public investment companies are themselves covered under Section 806." Even if the statute does not cover employees of non-public entities more generally, the Plaintiffs contend courts have applied Section 806 to employees of companies that act on behalf of publicly held affiliates and that are almost inseparable from them.

Case law and federal regulations have described the singular importance of the investment adviser in managing mutual fund affairs. *See Tannenbaum v. Zeller*, 552 F.2d 402, 405 (2d Cir. 1977) ("Control of a mutual fund . . . lies largely in the hands of the investment adviser."); Investment Company Act Release No. 24082 (Oct. 14, 1999), 64 Fed. Reg. 59,826, 59,827 (Nov. 3, 1999) ("[I]nvestment advisers typically dominate the funds they advise."). According to Zang, "all or substantially all" of Fidelity Management's activities are performed on behalf of the Funds, and all of the Funds' "day-to-day" functions and decisions are made by Fidelity Management. The Funds and Fidelity Management are thus "inextricably intertwined." The implication of this argument is that any employment action taken by Fidelity Management can be attributed to the Funds, and is therefore covered by SOX.

Because I have concluded that employees of agents, contractors, and subcontractors of public companies are protected by Section 806, and because investment advisers to mutual funds fall in this category of employees, I need not reach this alternative statutory argument proffered by the Plaintiffs. But I will note that Zang's characterization of mutual funds and their investment advisers runs counter to the overall legal framework for mutual funds, as defined by the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.*, and the Investment Advisers Act of 1940, 15 U.S.C. § 80b-1 *et seq.* This framework defines investment companies and investment advisers

distinctly, *see* 15 U.S.C. § 80a-3(a)(1), (11), and identifies their interests as distinct. *See* 15 U.S.C. § 80a-1(b)(2) (stating that the public interest and investors are harmed when investment companies are organized in the interest of investment advisers). This legal distinction is in keeping with case law on liability for securities law violations. In *In re Fidelity/Micron Sec. Litig.*, 964 F. Supp. 539 (D. Mass. 1997), the issue was whether a mutual fund shared primary liability, under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78t(a), for statements made by FMR Corp. Judge Stearns concluded that FMR Corp., through contractual delegation, was responsible for all of the mutual fund's trading decisions and communications; consequently, the statements of the investment adviser's employees could not be imputed to the mutual fund. *Id.* at 544. Given the legal distinctions between mutual funds and the companies that provide investment services to them, I find unpersuasive the argument that the employees of these investment services companies are intertwined with and indistinguishable from mutual funds.

C. Do the Allegations Satisfy the Requirements of § 1514A?

Fidelity Investments and Fidelity Management make the additional contention that even if Lawson and Zang were covered "employees" for purposes of 18 U.S.C. § 1514A(a), they nonetheless failed to engage in protected activity under § 1514A(a)(1). The

Defendants argue that Lawson and Zang failed to satisfy the "reasonable belief" requirement, and failed to communicate with sufficient particularity their suspicions of fraudulent activity.

1. The Meaning of Reasonable Belief

The whistleblower provision protects employees who provide information "which the employee reasonably believes constitutes a violation" of federal laws and SEC rules covered by the statute. 18 U.S.C. § 1514A(a)(1). The First Circuit has recently concluded that the term "reasonable belief" has both a subjective and objective component. *Day v. Staples, Inc.*, 555 F.3d 42, 54 (1st Cir. 2009).

To demonstrate an objectively reasonable belief, the plaintiff does not need to cite a particular code provision, but the plaintiff "must show that his communications to the employer *specifically related* to one of the laws listed in § 1514A." *Id.* at 55 (emphasis added); *see also Platone v. U.S. Dep't of Labor,* 548 F.3d 322, 327 (4th Cir. 2008) (concluding that a plaintiff must state with sufficient particularity why she believes the actions would violate securities laws and constitute fraud). In other words, the employee's theory of fraud "must at least approximate the basic elements of a claim of securities fraud." *Day,* 555 F.3d at 55; *cf. O'Mahony,* 537 F. Supp. 2d at 517 (stating that § 1514A protects a whistleblower's reporting of fraud "under any of the enumerated statutes regardless of whether the misconduct relates

to 'shareholder' fraud"). A disagreement with management about a company's internal procedures is not actionable. *Day,* 555 F.3d at 56.

2. Lawson's Allegations

I find that the Plaintiffs have alleged facts concerning reasonable belief sufficient to survive a motion to dismiss. In the case of Lawson, she has alleged that she had a reasonable belief that her employers were facilitating fraud against mutual fund investors. For example, she has alleged that she believed a group within Fidelity Brokerage had improperly retained $10 million in 12b-1 fees paid by the Funds. Federal securities laws regulate the payment of 12b-1 fees, and taking Lawson's allegations as true, her belief that Fidelity Brokerage's retention of fees constituted a securities violation could have been both objectively and subjectively reasonable. She has also alleged that her employer provided incorrect information to the Funds' Board of Trustees that had a relation to the Funds' contracts with Fidelity Investments. Section 15 of the ICA obligates the investment adviser to provide a mutual fund's board of trustees with the information necessary to evaluate the terms of an investment adviser contract, 15 U.S.C. § 80a-15(c), and Lawson may have had a reasonable belief that Fidelity Investments was violating this provision. The Defendants have challenged the objective and subjective reasonableness of Lawson's beliefs, but I am satisfied that Lawson's pleadings have alleged

sufficient facts to support her belief that fraudulent activity may have been taking place.

Fidelity Investments challenges the sufficiency of her pleadings on two additional bases. First, the Defendants argue that Lawson has not alleged any reports that "specifically related" to one of the six categories of violations listed in the statute. *Day,* 555 F.3d at 55. Lawson has alleged, however, that she reported her concerns about the improper 12b-1 fee retention to Vice President Komishane (Am. Compl. ¶ 37.1), and reported her concerns regarding the inaccurate reports that were allegedly made to the Board of Trustees (Am. Compl. ¶ 54). Generalized complaints or complaints of administrative missteps are not protected activity. *See Livingston,* 520 F.3d at 352 n. 1 (commenting that Section 806 does not protect the reporting of "administrative missteps and inadvertent omissions"); *Harvey v. Home Depot USA, Inc.,* No. 04-144, at 15 (ARB June 2, 2006) (noting that protected activity does not include reporting that could adversely affect the corporation's financial condition, when no fraudulent or deceptive activity is suspected). Here, however, Lawson allegedly reported specific problems in corporate conduct which – because they involved the delicate and regulated relationship between mutual fund and investment adviser – she may have had reason to believe constituted fraudulent activity.

Fidelity Investments next argues that any communications that did take place were merely part of

her job, rather than a reporting of fraud for whistleblower purposes. The legal principle cited to support this charge comes not from SOX, but rather from the federal Whistleblower Protection Act, 5 U.S.C. § 1211 *et seq.* *See Huffman v. Office of Personnel Mgmt.*, 263 F.3d 1341, 1352 (Fed. Cir. 2001) (finding that protected activity did not include "reporting in connection with assigned normal duties"). Even if SOX incorporates such a rule, however, it would be a matter of fact, not law, whether or not Lawson's activities were performed as part of her regular duties.

3. Zang's Allegations

In the case of Zang, the alleged protected activity was the distribution of the March 2005 memorandum that conveyed his concerns about the SAI's disclosures regarding portfolio manager compensation. Fidelity Management argues that the March memorandum never expressed concern about a violation of federal law relating to shareholder fraud. According to the Defendants, Zang's missive was merely an expression of his own personal views about the conduct of Fidelity's business, not about potential securities violations.

As with Lawson's claims, I cannot dispose of Zang's complaint before the factfinding stage of litigation. Zang has alleged facts supporting his belief that Fidelity's compensation scheme was not transparent. As I have discussed, compensation of investment advisers generally is a matter that has received

considerable attention from both Congress and the federal courts. Whether or not the SAI disclosures were in fact fraudulent statements that violated federal law is not at issue. Rather, the issue is one of belief, and I find that Zang has alleged facts relating to improper communications to the SEC regarding manager compensation. These allegations are sufficient to support a claim of objectively and subjectively reasonable belief that Fidelity was failing to meet its obligations under the ICA or SEC rules and regulations.

The Defendants maintain that Zang's comments amounted to a "quibbling" over the technically correct description of the analyst compensation formula. How to characterize Zang's comments is a matter for factual development, not legal resolution on a motion to dismiss. It is adequate at this stage to conclude that Zang's characterizations of his communication could be supported by the allegations in his Complaint.

D. Plaintiffs' State Wrongful Discharge Claims

Both Plaintiffs allege wrongful discharge in violation of public policy, but they identify different public policies in play. Zang points to the protection of investors in mutual funds from fraud, and protecting the reporting of such fraud by employees, while Lawson points more broadly to the protection of whistleblowing concerning potential violations of federal laws concerning fraud against shareholders.

Massachusetts recognizes the "at-will termination" doctrine, which permits either party, the employer or employee, to terminate employment at any time "without notice, for almost any reason or for no reason at all." *Wright v. Shriners Hosp. for Crippled Children,* 589 N.E.2d 1241, 1244 (Mass. 1992). Massachusetts courts have permitted, however, an exception to this rule when based on public policy. *Smith-Pfeffer v. Superintendent of the Walter E. Fernald State School,* 533 N.E.2d 1368, 1371 (Mass. 1989). But the public policy exception to the at-will termination rule is "quite narrow." *Mitchell v. TAC Technical Servs., Inc.,* 734 N.E.2d 1198, 1201 (Mass. 2000). For a claimant to proceed, he or she must identify "a statute or regulation which clearly expresses a legislative policy" of Massachusetts. *Tighe v. Career Sys. Dev. Corp.,* 915 F. Supp. 476, 484 (D. Mass. 1996); *see also Wright,* 589 N.E.2d at 1244-46 (finding no claim for wrongful discharge when the court could not find a statute that "clearly expresse[d] a legislative policy" that protected or encouraged the plaintiff's activity). To identify a termination that is unlawful on public policy grounds, one must find that "the Massachusetts] Legislature has expressed a policy position concerning the rights of employees." *Mello v. Stop & Shop Cos., Inc.,* 524 N.E.2d 105, 106 (Mass. 1988).

Neither Plaintiff identifies a public policy expressed by Commonwealth lawmakers that is at risk in this situation. The only statute to which Zang refers is "federal whistle-blower provisions," presumably Section 806 of SOX. Lawson likewise does not

provide sources supporting her claim that Massachusetts has a public policy protecting whistleblowing that involves federal SEC violations and shareholder fraud.

There is case law, however, acknowledging a Massachusetts public policy to protect whistleblowers more generally. *See Smith v. Mitre Corp.*, 949 F. Supp. 943, 950 (D. Mass. 1997) (concluding that the Supreme Judicial Court would apply the public policy exception to include protection for whistleblowers); *Tighe*, 915 F. Supp. at 484 (acknowledging "a legislative policy encouraging persons such as [the plaintiff] to inform the DOL of possible contractual or statutory violations by their employers"); *Shea v. Emmanuel College*, 682 N.E.2d 1348, 1350 (Mass. 1997) (holding that an employer can be liable for discharges based on an employee's internal complaints of alleged criminal violations); *Mello*, 524 N.E.2d at 108 n.6 ("We assume . . . that an at-will employee who 'blew the whistle' within his company on wrongdoing is entitled to protection. . . .").

It is therefore conceivable that a plaintiff may plead wrongful discharge based on retaliation for whistleblowing activity generally. Such pleading is not sufficient in these cases, however, to give the Plaintiffs a cause of action. A plaintiff cannot seek common law remedies for wrongful discharge when a statutory scheme already provides remedies for the same conduct. In *Melley v. Gillette Corp.*, 475 N.E.2d 1227 (Mass. App. 1985) ("*Melley I*"), whose reasoning was adopted by the Supreme Judicial Court, 491

N.E.2d 252, 253 (Mass. 1986), the Appeals Court held that for a common law remedy of wrongful discharge to apply, there must be no other way to vindicate the public policy at stake. *Melley I,* 475 N.E.2d at 1228. If the public policy "is already protected by a comprehensive legislative scheme," there is no warrant for the creation of a new common law remedy. *Id.* The *Melley* court expressed concerns that the common law action would permit claimants to circumvent the preferred legislative remedy, and would create "duplicative remedies" disfavored by the Supreme Judicial Court. *Id.* at 1229. SOX, which expresses a public policy of protecting shareholders from fraud and the whistleblowers who report this fraud, has an explicit remedy for dealing with terminations that run contrary to this public policy.

Zang responds to this legal analysis by crying foul: The Defendants cannot simultaneously argue that SOX does not cover investment adviser employees such as the Plaintiffs, while also arguing that investment adviser employees are barred from common law relief by nature of the SOX statutory scheme. Zang's position misconstrues the application of a statutory scheme to the common law of wrongful discharge. SOX does not preclude relief at common law because employees are entitled to relief through SOX; rather, the SOX statutory scheme precludes relief at common law because Congress has already spoken on how (and to whom) remedies should be made available.

Lawson argues that even if a federal statute does address a public policy, a claimant can still seek common law relief for wrongful discharge if the policy precedes the statute. *See Norris v. Lumbermen's Mut. Cas. Co.*, 881 F.2d 1144, 1153 (1st Cir. 1989) (permitting a plaintiff to pursue wrongful discharge when it involved a strong public policy favoring the reporting of safety hazards, "independent of" and "regardless of" the statute that addressed the same policy). I am not persuaded that the protection of employees who report violations of federal shareholder rules is a "strong public policy" of the same magnitude as maintaining safety at nuclear energy plants, such that it warrants independent enforcement through the common law. *See id.* Nor am I persuaded that this public policy existed in any articulable form before the Enron scandal and subsequent congressional response through SOX.

Having found no public policy articulated by the Massachusetts legislature that is violated by the Plaintiffs' discharge (or alleged "constructive discharge," in Lawson's case), and having concluded that the public policy articulated at the federal level is already protected through an adequate remedial scheme, I dismiss Count II of the Complaint.

IV. CONCLUSION

For the reasons stated more fully above, I DENY Fidelity Investments' Motion to Dismiss Lawson's Amended Complaint (Doc. No. 24 in Civil Action No.

08-10466-DPW), and I DENY Fidelity Management's Motion to Dismiss Zang's Complaint (Doc. No. 25 in Civil Action No. 08-10758-DPW) as to the SOX claims (Count I). I GRANT the Defendants' motions as to the state wrongful discharge claims (Count II).

/s/ Douglas P. Woodlock
DOUGLAS P. WOODLOCK
UNITED STATES
DISTRICT JUDGE

United States Court of Appeals
For the First Circuit

No. 10-2240

JACKIE HOSANG LAWSON; JONATHAN M. ZANG,

Plaintiffs, Appellees/Cross-Appellants,

v.

FMR LLC, f/k/a FMR Corp.; FMR CO., INC.; FMR CORP., d/b/a Fidelity Investments; FMR LLC, d/b/a Fidelity Investments; FIDELITY BROKERAGE SERVICES, LLC, d/b/a Fidelity Investments; FIDELITY MANAGEMENT & RESEARCH COMPANY,

Defendants, Appellants/Cross-Appellees.

Before

Lynch, *Chief Judge*,
Torruella, Boudin, Howard and Thompson,
Circuit Judges.

ORDER OF COURT

Entered: April 6, 2012

The petitions for rehearing filed by Jackie Hosang Lawson and Jonathan M. Zang having been denied by the panel of judges who decided the case, and the petitions for rehearing en banc filed by Jackie Hosang Lawson and Jonathan M. Zang having been submitted to the active judges of this court and a

majority of the judges not having voted that the case be heard en banc, it is ordered that the petitions for rehearing and the petitions for rehearing en banc be *denied.*

TORRUELLA, *Circuit Judge*, dissenting without comment.

THOMPSON, *Circuit Judge*, dissenting. For the reasons expressed in my dissent from the panel opinion, I dissent from the denial of rehearing. *See Lawson et al. v. FMR LLC et al.*, 670 F.3d 61, 83 (1st Cir. 2012) (Thompson, J., dissenting).

By the Court:

/s/ Margaret Carter, Clerk

cc: Hon. Douglas P. Woodlock, Ms. Sarah Thornton, Clerk, United States District Court for the District of Massachusetts, Mr. Scalia, Ms. Talwani, Mr. Rees, Mr. Zang, Ms. Smith, Ms. Rieser, Mr. Rosenberg, Mr. Nemser, Mr. Humes, Ms. Conrad, Ms. Kawka, Mr. Karr, Ms. Butler, Mr. Benoit, Mr. Lesser, Mr. Goldsmith.

U.S. Department of Labor [SEAL]
Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

THOMAS SPINNER,
COMPLAINANT,

v.

DAVID LANDAU and ASSOCIATES, LLC,
RESPONDENT.

ARB CASE NOS. 10-111
10-115

ALJ CASE NO. 2010-SOX-029

DATE: May 31, 2012

BEFORE:
THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Daniel A. Corey, Esq., *Sensible Law Institute*, Drexel Hill, Pennsylvania

For the Respondent:
Keith J. Rosenblatt, Esq., Jacqueline K. Hall, Esq., *Littler Mendelson, P.C.*, Newark, New Jersey

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*; Judge E. Cooper Brown concurring.

FINAL DECISION AND ORDER OF REMAND

This case arises under Section 806 of the Sarbanes-Oxley Act of 2002 (Section 806), 18 U.S.C.A. § 1514A (West Supp. 2010).[1] The issue on appeal is whether Section 806 applies only to publicly traded companies and their employees.[2] Thomas Spinner was an employee of Respondent David Landau & Associates (DLA). DLA was a contractor of a publicly traded corporation but was not itself publicly traded. After DLA terminated Spinner's employment, he filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his termination violated Section 806 and its implementing regulations at 29 C.F.R. Part 1980 (2011). The Administrative Law Judge (ALJ) granted summary decision in favor of DLA, concluding that DLA was not publicly traded and therefore neither DLA nor its employees were covered under Section 806. We reverse and remand.

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[1] The Act and its implementing regulations (29 C.F.R. Part 1980) have been amended since Spinner filed his complaint. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010); 76 Fed. Reg. 68,084-97 (Nov. 3, 2011). Neither the amendments to SOX nor the regulations' amendments would affect the outcome of this case.

[2] For convenience, we refer to companies registered under Section 12 or required to file under Section 15(d) of the Exchange Act as "publicly traded."

BACKGROUND

Spinner is a Certified Public Accountant, Certified Internal Auditor, and Certified Fraud Examiner. DLA hired Spinner in March 2008 as an internal auditor. DLA provides internal audit, forensics, and advisory and management consulting services, including SOX audit and compliance services,[3] under contract to S.L. Green Realty Corp. (S.L. Green), a publicly traded company.[4] On or about September 2, 2008, DLA assigned Spinner to perform full-time auditing services for S.L. Green. DLA subsequently removed Spinner from this assignment, and on or about October 1, 2008, terminated Spinner's employment. Spinner filed an administrative complaint with OSHA on December 29, 2008, claiming DLA violated Section 806 when it terminated him because he reported internal control and reconciliation problems at S.L. Green. OSHA issued its finding on February 5, 2010, concluding in part that DLA, as a contractor of S.L. Green, was itself a covered entity and that Spinner, having alleged misconduct by S.L. Green, was a covered employee. OSHA concluded, however, that clear and convincing evidence demonstrated that DLA would have taken the adverse action even if Spinner had not engaged in protected activity.

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[3] ALJ Recommended Summary Decision Dismissing Complaint (D. & O.), at n.1.

[4] The Respondent refers to S.L. Green as "a client for whom DLA had conducted audits in years past." DLA Br. at 9. The parties do not dispute that DLA is a contractor of S.L. Green.

Spinner objected to OSHA's findings, and the case was assigned to an ALJ. DLA filed a motion for summary decision on two grounds: DLA is not a covered entity and DLA would have terminated Spinner even if he had not engaged in protected activity. The ALJ granted summary decision, as matter of law, on the grounds that DLA was not a covered entity and that Spinner, as an employee of DLA, was not a covered employee. On appeal to the Administrative Review Board (ARB or Board), Spinner argues that the ALJ erred and that he was covered as an employee of DLA because DLA was a contractor, subcontractor, or agent of S.L. Green. DLA cross-petitioned requesting the ARB to issue a $1,000 penalty against Spinner for filing a fraudulent administrative claim. DLA also asked the Board to hold that the ALJ erred in failing to find that clear and convincing evidence demonstrated that it would have terminated Spinner absent protected activity.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB her authority to issue final agency decisions under the SOX. *See* Secretary's Order 1-2010 (Delegation of Authority and Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). We review a recommended decision granting summary decision de novo. That is, the standard that the ALJ applies also governs our review. 29 C.F.R. § 18.40 (2011). Accordingly, summary decision is appropriate if there is no genuine issue of material fact and the

moving party is entitled to judgment as a matter of law. The determination of whether facts are material is based on the substantive law upon which each claim is based. A genuine issue of material fact is one, the resolution of which could establish an element of a claim or defense and, therefore, affect the outcome of the action.

We view the evidence in the light most favorable to the non-moving party and then determine whether there are any genuine issues of material fact and whether the ALJ correctly applied the relevant law. *Lee v. Schneider Nat'l, Inc.*, ARB No. 02-102, ALJ No. 2002-STA-025, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 2000-STA-052, slip op. at 2 (ARB Dec. 13, 2002). "To prevail on a motion for summary judgment, the moving party must show that the nonmoving party 'fail[ed] to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial.'" *Bobreski v. U.S. Envtl. Prot. Agency*, 284 F. Supp. 2d 67, 73 (D.D.C. 2003) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). Accordingly, a moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party." *Bobreski*, 284 F. Supp. 2d at 73.

Furthermore, a party opposing a motion for summary decision "may not rest upon the mere allegations or denials of [a] pleading. [The response] must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R.

§ 18.40(c); *Webb v. Carolina Power & Light Co.*, No. 1993-ERA-042, slip op. at 4-6 (Sec'y July 14, 1995).

DISCUSSION

This case presents the issue of whether Section 806(a) of the Sarbanes-Oxley Act, 18 U.S.C.A. § 1514A(a), affords whistleblower protection to an employee of a contractor of a publicly traded company when the employee reports activity that he reasonably believes constitutes a violation of the laws or SEC regulations identified under Section 806. The ALJ cited the language of SOX, its legislative history, and decisions from a variety of forums to support his conclusion that Section 806's coverage is limited to publicly traded companies and their employees.[5]

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[5] Although the decision is imprecise on this point, the ALJ appeared to also rule that only publicly traded employers are covered by the proscriptions contained in Section 806. We disagree and reverse. Given our precedent, the implementing regulations, and the fact that the plain language of Section 806 explicitly identifies several categories of potentially covered employers which are not registered or required to file under the Exchange Act (i.e., "any officer, employee, contractor, subcontractor, or agent of such company"), it is unnecessary to elaborate on our conclusion that Section 806 covers certain non-publicly traded entities including contractors. On this issue, we concur with the First Circuit, which recently concluded that "the clause 'officer, employee, contractor, subcontractor, or agent of such Company' goes to who is prohibited from retaliating or discriminating." *Lawson v. FMR, LLC*, 670 F.3d 61, 68 (1st Cir. 2012); *see also Kalkunte v. DVI Financial Servs. & AP Servs.*, ARB Nos. 05-139, -140; ALJ No. 2004-SOX-056 (ARB Feb. 27, 2009) (holding a contractor jointly liable, together with a

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D. & O. at 2-3. Department of Labor regulations and Board precedent, however, state that whistleblower protection is not limited solely to employees of publicly traded companies. As explained below, we reverse the ALJ's decision and find that Spinner is a covered employee under Section 806.

The Department of Labor regulations implementing Section 806, which we are obliged to follow,[6] define employee as "an individual presently or formerly working for a company or company representative . . . or an individual whose employment could be affected by a company or company representative." 29 C.F.R. § 1980.101. A "company representative" is defined as "any officer, employee, contractor, subcontractor, or agent of a company." *Id.* These regulations explicitly identify two distinct bases for coverage as an "employee" under the statute: (1) coverage based simply upon being an employee (or former employee) of a named publicly traded company, or a "contractor, subcontractor or agent" of such company and (2) coverage based upon the more conventional master-servant relationship expressed as "an individual whose employment could be affected by" a named

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publicly traded company, for retaliatory discharge of an employee of the public company where the contractor, through its own employees, made decisions affecting the employee's employment).

[6] *See* 75 Fed. Reg. 3925 (Jan. 15, 2010) ("The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations . . . and shall observe the provisions thereof, where pertinent, in its decisions.").

employer. As explained in the preamble accompanying the regulations' promulgation, the Department views Section 806 as "protect[ing] the employees of publicly traded companies as well as the employees of contractors, subcontractors, and agents of those publicly traded companies."[7]

Consistent with the Department's understanding, the ARB has repeatedly interpreted Section 806 as affording whistleblower protection to employees of contractors, subcontractors, or agents of publicly traded companies, regardless of the fact that the contractor, subcontractor, or agent was not itself a publicly traded company. *See Charles v. Profit Inv. Mgmt.*, ARB No. 10-071, ALJ No. 2009-SOX-040 (ARB Dec. 16, 2011); *Funke v. Federal Express Corp.*, ARB No. 09-004, ALJ No. 2007-SOX-043 (ARB July 8, 2011); *Johnson v. Siemens Building Techs.*, ARB No. 08-032, ALJ No. 2005-SOX-015 (ARB Mar. 31, 2011)[8] As the ARB explained in *Funke*:

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[7] 59 Fed. Reg. 52,104, 52,105-52,106 (Aug. 24, 2004). This expansive definition of "employee" under Section 806 reflects decades of Department of Labor precedent extending coverage under analogous whistleblower statutes to employees of contractors. *See* discussion, *infra* pp. 13-16.

[8] In *Kukucka v. Belfort Instrument Co.*, ARB Nos. 06-104, -120; ALJ Nos. 2006-SOX-057, -081 (ARB Apr. 30, 2008), the ARB recognized in dicta that an employee of a contractor, subcontractor, or agent of a publicly traded company could be protected by Section 806. In *Gale v. World Fin. Group*, ARB No. 06-083, ALJ No. 2006-SOX-043 (ARB May 29, 2008), the ARB cited evidence showing that complainant's employer served as

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> In drafting § 1514A, Congress pointedly expanded traditional employer-employee definitions by subjecting additional entities to liability for retaliation, not only publicly traded companies, but "any officer, employee, contractor, subcontractor, or agent of such company." Congress understood that to effectively address corporate fraud, the law needed to extend to entities *related* to public companies – accounting firms, law firms, and the like – which may themselves be involved in performing or disguising fraudulent activity. Employees of these non-public entities are also covered under § 1514A, and by extension, their reports of misconduct by the related public company (not their employer) would be protected under the statute.[9]

Notwithstanding this body of ARB case authority, the majority in *Lawson v. FMR, LLC*, 670 F.3d 61 (1st Cir. 2012), recently held that Section 806 provides whistleblower protection only to employees of publicly traded companies. The *Lawson* plaintiffs were employees of investment advisors servicing publicly traded mutual funds. After rejecting respondents'

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an agent of a public company in promoting sale of securities products as sufficient to establish a genuine issue of fact concerning coverage under Section 806). In *Klopfenstein v. PCC Flow Techs.*, ARB No. 04-149, ALJ No. 2004-SOX-011 (ARB May 31, 2006) (*Klopfenstein I*), the ARB held that a non-publicly traded subsidiary acting as an agent of its publicly traded parent company was itself liable under Section 806 for its retaliatory termination of one of its employees.

[9] *Funke*, ARB No. 09-004, slip op at 9-10.

motion for summary judgment for lack of coverage, the District Court certified to the First Circuit the question of coverage of employees of investment advisors servicing publicly traded mutual funds. The First Circuit, like the ALJ in this case, ruled that employees of those non-publicly traded entities are not covered under Section 806.

The First Circuit's *Lawson* holding is not controlling in this case, and we decline to adopt it.[10] As stated in *Charles*, ARB No. 10-071, and *Johnson*, ARB No. 08-032 – both issued prior to the First Circuit's *Lawson* decision – we cannot conclude that Section 806 coverage is limited to employees of public companies. The legislative history of the SOX "demonstrates that Congress intended to enact robust whistleblower protections for more than employees of publicly traded companies." *Johnson*, ARB No. 08-032, slip op. at 17. Nevertheless, in light of the First Circuit's decision in *Lawson*, it is imperative to fully explain the basis for our holding that accountants employed by private accounting firms, who in turn

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[10] The case before us did not arise in the First Circuit, so we are not bound by *Lawson*. Because there is no rule of intercircuit stare decisis, federal agencies are not bound by the decision of a circuit court in litigation arising in other circuits. *See Brizendine v. Cotter & Co.*, 4 F.3d 457, 462 n.4 (7th Cir. 1993) (vacated on other grounds); *see generally* Samuel Estreicher & Richard Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 735-41 (1989). *See also Nichols v. Bechtel Constr. Inc.*, 1987-ERA-044, slip op. at 6 (Sec'y Oct. 26, 1992), *aff'd sub nom. Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 932 (11th Cir. 1995).

provide SOX compliance services to publicly traded corporations, are covered as employees of contractors under Section 806.

1. Section 806 Textual Analysis

Congress enacted Section 806 on July 30, 2002, as part of the comprehensive effort contained in the Sarbanes-Oxley Act (SOX) to address corporate fraud. Title VIII is designated the Corporate and Criminal Fraud Accountability Act of 2002 (the Accountability Act). Section 806, the employee-protection provision, prohibits covered employers and individuals from retaliating against employees for providing information or assisting in investigations related to certain enumerated infractions. The provision, as amended, reads, in relevant part:

> (a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES. – No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee –

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire, radio, TV fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by –

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C.A. § 1514A.

To determine whether an employee of a "contractor, subcontractor or agent" is afforded protection under Section 806, the starting point "is the language of the statute itself"[11] and the implementing regulations construing the relevant statutory text.[12] The plain language of the statute does not restrict its application to employees of publicly held companies. Congress could easily have limited coverage simply by statutorily defining the term "employee" or by adding the words "of such company" after the term "employee" – exactly as Section 806 limits those liable under the statute to "any officer, employee, contractor, subcontractor, or agent of *such company*." Had Congress chosen to so limit the text, Section 806 would extend coverage solely to "employees *of such company* [with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d))]."[13] The statute contains no such limitation, and we decline to impose one.

Nevertheless, the statute's lack of definition of "employee" leaves the text open to competing

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[11] *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990); SINGER & SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION § 46.1 (7th Ed.).

[12] *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009).

[13] *See Pac. Operators Offshore, LLP v. Valladolid*, 132 S. Ct. 680, 687 (2012).

problematic interpretations. The *Lawson* majority argues that Congress could not have intended to protect employees of contractors, subcontractors, or agents because that would also mean that Congress intended to protect employees of an "employee" or employees of an "officer," which leads to an absurd result. *United States v. Wilson*, 503 U.S. 329, 334 (1992) (statutes should be construed to avoid absurd results); *Lawson*, 670 F.3d at 68-69. We reject this forced distribution of "employee of" to the list of actors prohibited from retaliating against employees in violation of Section 806. The commentary accompanying the DOL's regulations implementing Section 806 explains Congress's reasoning for adding additional parties to the list of actors prohibited from retaliation.

> In addition to the general definitions, the regulations define "company" and "company representative" to together include all entities and individuals covered by Sarbanes-Oxley. The definition of "named person" includes the employer as well as the company and company representative who the complainant alleges in the complaint to have violated the Act. Thus, the definition of "named person" will implement Sarbanes-Oxley's unique statutory provisions that identify individuals as well as the employer as potentially liable for discriminatory action. We anticipate, however, that in most cases the named person likely will be the employer.

69 Fed. Reg. 52,105.

Section 806's use of "employee" is logically separate from the clause prohibiting actors from retaliation. After proscribing retaliation by several entities, Congress listed protections for employees without using words to limit which kind of employee was protected. As noted above, Congress easily could have limited "employee" to "employee of a company registered under Section 12 or required to file under Section 15(d) of the Exchange Act" in the text of the provision itself but chose not to.

In any case, the restrictive construction of the statute that DLA and the ALJ adopted results in an entirely implausible reading of the statute's language. Under such a reading, coverage of contractors, subcontractors, or agents would be limited to those contractors, subcontractors, and agents who have the ability to affect the terms, conditions, and privileges of employees of publicly traded companies – not their own employees. A successful Section 806 complainant may be entitled to reinstatement to his or her former employment and the award of back pay. But rarely would a contractor or especially a subcontractor be able to adversely affect the terms and conditions of an individual's employment with a publicly traded company – let alone be able to reinstate that individual to his or her former employment following successful suit against the contractor or subcontractor by the aggrieved employee. And if they did, the contractor or subcontractor would likely be an agent of the public company, thus rendering "contractor" and

"subcontractor" superfluous. *Lawson*, 670 F.3d at 84-85 (Thompson dissenting).

That said, the statute's lack of definition of employee results in some ambiguity. Thus, we necessarily turn to other rules of statutory interpretation in defining the scope of employee coverage under Section 806.

2. Use of "Employees of Publicly Traded Companies" in Section 806's Title

The ALJ's conclusions and the Respondent's arguments urge the ARB to construe Section 806 to apply only to employees of publicly traded companies because of Section 806's caption, "employees of publicly traded companies," and similar statements found in its legislative history. We do not find the caption, "employees of publicly traded companies," to be controlling. As the Supreme Court said in *Brotherhood of R. R. Trainmen v. Baltimore & O. R. Co.*:

> Th[e] heading is but a short-hand reference to the general subject matter involved. . . . [H]eadings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most [general] manner; to attempt to refer to each specific provision would often be ungainly as well as useless. . . . For interpretative purposes, they are of use only when

> they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.

331 U.S. 519, 528-29 (1947)

In this case, the oft-cited rule against treating statutory titles as controlling rings true. Neither the title nor the caption describes the full scope or complexity of Section 806's provisions. Several indicia and the text itself indicate that Congress held no such intention for Section 806 coverage. The phrase "employees of public companies" serves as shorthand for the typical complainant but not a concrete rule describing every complainant. Congress also used similar shorthand in the caption of the Wendell H. Ford Aviation Investment Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (Thomson/West 2007), "Discrimination against airline employees." But as we discuss below, the AIR 21 text includes coverage of employees of contractors and subcontractors. Moreover, the Dodd-Frank amendment added express coverage for employees of subsidiaries, affiliates, and statistical rating organizations to Section 806. Dodd-Frank, P.L. No. 111-203 § 929A, 124 Stat. 1848, 1852. While clarifying or adding coverage for employees of these private entities, Congress did not change Section 806's caption "employees of public companies." It did not feel the need to because it never intended for this shorthand to be a limitation on its intended coverage of employees of contractors, subcontractors, or agents.

As noted above, the ARB is bound by the DOL regulations.[14] During the notice-and-comment phase, one commentator argued that the proposed DOL regulations implementing Section 806 improperly extended coverage beyond the statutory language found in the caption. The DOL responded that regulations accurately reflect the text of Section 806.

> Plains AAP commented that the regulatory definitions of "employee" and "company representative" work together to broaden the statutory definition of protected employees. Specifically, Plains AAP commented that section 806(a) of the Sarbanes-Oxley Act is captioned "Whistleblower protection for employees of publicly traded companies," yet the definitions of "employee" and "company representative" in the regulations provide protection to employees of contractors and subcontractors of publicly traded companies. OSHA believes that the definitions in this section accurately reflect the statutory language. Notwithstanding its caption, section 806(a) expressly provides that no publicly traded company, "or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee. * * *" The statute thus protects the employees of

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[14] *See* 75 Fed. Reg. 3925 (Jan. 15, 2010); *Williams v. Am. Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004 (ARB Dec. 29, 2010).

> publicly traded companies as well as the employees of contractors, subcontractors, and agents of those publicly traded companies. Accordingly, OSHA does not believe that its regulatory definitions broaden the class of employees that are protected under the plain language of Sarbanes-Oxley.

69 Fed. Reg. 52,105-06.

Accordingly, we conclude that Congress did not intend for the content of the caption to limit coverage to only employees of publicly traded companies.

3. Legislative History Confirms Broad Coverage

Nothing in the SOX's legislative history indicates that Congress intended to limit whistleblower protection under Section 806 to only employees of publicly traded companies.[15] Indeed, denying coverage to employees of contractors, subcontractors, or agents runs counter to the goals of Section 806 and SOX generally. The purpose of the statute is to protect the investing market and the employees who blow the whistle on issuer-related activities contained in Section 806. The Senate Report accompanying the amendment adding whistleblower coverage provided:

> The alleged activity Enron used to mislead investors was not the work of novices. It

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[15] *Lawson*, 670 F.3d at 86-87.

was the work of highly educated professionals, spinning an intricate spider's web of deceit. The partnerships – with names like Jedi, Chewco, Rawhide, Ponderosa and Sundance – were used essentially to cook the books and trick both the public and federal regulators about how well Enron was doing financially. The actions of Enron's executives, accountants, and lawyers exhibit a "Wild West" attitude which valued profit over honesty. . . .

Much of this conduct occurred with "extensive participation and structuring advice from [Arthur] Andersen," ("Andersen") which was simultaneously serving as both consultant and "independent" auditor for Enron.

With the assistance of Andersen and its other auditors, Enron apparently successfully deceived the investing public and reaped millions for some select few insiders. To the outside world, Enron and its auditors were either not reporting their massive debt at all, or were making "disclosures [that] were obtuse, did not communicate the essence of [Enron] transactions completely or clearly, and failed to convey the substance of what was going on between Enron and its partnerships". . . . In short, through the use of sophisticated professional advice and complex financial structures, Enron and Andersen were able to paint for the investing public a very different picture of the company's financial health than the true picture revealed. . . .

S. Rep. 107-146, 2002 WL 863249, at **2-3 (May 6, 2002) (internal footnotes omitted).

The legislative history discusses not only Congress's objective of protecting employees of a publicly traded company, but also protecting employees of private firms that work with, or contract with, publicly traded companies when such employees blow the whistle on fraudulent corporate practices. The Senate Report stated:

> As investors and regulators attempted to ascertain both the extent and cause of their losses, employees from Andersen were allegedly shredding "tons" of documents, according to the Andersen Indictment. . . .
>
> The apparent efforts to cover up any alleged misconduct by Enron or Andersen were not limited to Andersen and the destruction of physical evidence and documents. In a variety of instances when corporate employees at both Enron and Andersen attempted to report or "blow the whistle" on fraud, but [sic] they were discouraged at nearly every turn. For instance, a shocking e-mail from Enron's outside lawyers to an Enron official was uncovered. This e-mail responds to a request for legal advice after a senior Enron employee, Sherron Watkins, tried to report accounting irregularities at the highest levels of the company in late August 2001. The outside lawyer's [sic] counseled Enron, in pertinent part, as follows:

> You asked that I include in this communication a summary of the possible risks associated with discharging (or constructively discharging) employees who report allegations of improper accounting practices: 1. Texas law does not currently protect corporate whistleblowers. The supreme court has twice declined to create a cause of action for whistleblowers who are discharged * * *

In other words, after this high level employee at Enron reported improper accounting practices, Enron did not consider firing Andersen; rather, the company sought advice on the legality of discharging the whistleblower. . . .

According to media accounts, this was not an isolated example of whistleblowing associated with the Enron case. In addition, a financial adviser at UBS Paine Webber's Houston office claims that he was fired for e-mailing his clients to advise them to sell Enron stock. A top Enron risk management official alleges he was cut off from financial information and later resigned from Enron after repeatedly warning both orally and in writing as early as 1999 of improprieties in some of the company's off-balance sheet partnerships. An Andersen partner was apparently removed from the Enron account when he expressed reservations about the firm's financial practices in 2000. These

> examples further expose a culture, supported by law, that discourage employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally. This "corporate code of silence" not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. The consequences of this corporate code of silence for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied.

S. Rep. 107-146 at *4-5 (internal footnotes omitted).

Congress plainly recognized that outside professionals – accountants, law firms, contractors, agents, and the like – were complicit in, if not integral to, the shareholder fraud and subsequent cover-up officers of the publicly traded Enron perpetrated. Construing Section 806 as only protecting employees of publicly traded companies would leave unprotected from retaliation outside accountants, auditors, and lawyers, who are most likely to uncover and comprehend evidence of potential wrongdoing. Congress was clearly concerned about the role Arthur Anderson [sic] played in the Enron "debacle" and the retaliation exercised against one of its partners who attempted to blow the whistle.[16]

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[16] It is even more difficult to imagine that Congress would have intended to leave unprotected outside counsel who are

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The Respondents argue that congressmen repeatedly noted that SOX applies exclusively to public corporations registered with the SEC. 148 Cong. Rec. S. 7350, 7351 (July 25, 2002) ("[L]et me make very clear that it applies exclusively to public companies – that is, to companies registered with the Securities and Exchange Commission. It is not applicable to private companies, who make up the vast majority of companies across the country."); *see also* 148 Cong. Rec. S. 6493-95, S. 6330. The Respondents misconstrue these remarks, however, which address the comprehensive accounting requirements contained in the SOX Act and do not refer specifically to the whistleblower provisions. Read in context, these references to SOX applying only to "public companies" reflect a congressional aim to assuage the concerns of small private companies worried about the burden of SOX's regulatory regime. Congress sought to assure small business that the large publicly owned companies ultimately

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required under Section 307 of SOX to report evidence of material securities law violations. 15 U.S.C.A. § 7245, 17 C.F.R. Part 205. *See Jordan v. Sprint-Nextel Corp.*, ARB No. 06-105, ALJ No. 2006-SOX-041, slip op. at 16 (ARB Sept. 30, 2009) ("SOX Section 307 requiring an attorney to report a 'material violation' should impliedly be read consistent with SOX Section 806, which provides whistleblower protection to an 'employee' . . . who reports such violations. Thus, attorneys who undertake actions required by SOX Section 307 are to be protected from employer retaliation under the whistleblower provisions of SOX Section 806.").

responsible to shareholders were the focus of SOX's regulatory requirements.[17]

4. The Statutory Framework

The Sarbanes-Oxley Act's overall statutory scheme further supports our broad interpretation of employee coverage under Section 806 as but another of the myriad means that Congress fashioned to combat fraud. *See Succar v. Ashcroft*, 394 F.3d 8, 26 (1st Cir. 2005) ("[t]he terms and provisions of [the text at issue] must be understood in the larger context of the statutory scheme). As the First Circuit explained, SOX "is a major piece of legislation bundling together a large number of diverse and independent statutes, all designed to improve the quality of and transparency in financial reporting and auditing of public companies." *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 9 (1st Cir. 2006). The Court also noted that "[t]he whistleblower protection provision codified in 18 U.S.C. § 1514A is a relatively small part of the Sarbanes-Oxley Act which is composed of many separate statutes and statutory schemes aimed at achieving the act's investor-protection goals." *Id.* at 5. An interpretation limiting protection of whistleblowers to those only directly employed by a publicly

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[17] As Senator Enzi explained: "Our intent with this bill is not to have the same principles that apply to the Fortune 500 companies apply to the mom-and-pop business. . . . We have taken a lot of care to be sure we are not cascading the provisions down to small business." 148 Cong. Rec. S6339 (July 8, 2002).

traded company would sabotage the overriding purpose of protecting investors. The overall statutory framework and purpose demonstrate, indeed require, that Section 806 protects whistleblowing by employees of contractors and subcontractors to the public company.

5. Section 806 Follows the Framework of Analogous Whistleblower Statutes

Finally, it should be recognized that our inclusive definition of "employee" under Section 806 reflects decades of Department of Labor precedent extending coverage under analogous whistleblower statutes to employees of contractors. Congress patterned Section 806 on similar whistleblower protection provisions in the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2003 & Supp. 2011); AIR 21, 49 U.S.C.A. § 42121; and the Pipeline Safety Improvement Act of 2002 (PSIA), 49 U.S.C.A. § 60129 (Thomson/West 2007). *See* 69 Fed. Reg. 52,105. In particular, SOX's whistleblower-protection provisions very closely parallel the form of the employee-protection provision of Section 519 of AIR 21 codified at 49 U.S.C.A. § 42121. *See* Section 806, 18 U.S.C.A. 1514A(b)(2) (incorporating sections of AIR 21 by reference). AIR 21 provides:

> (a) DISCRIMINATION AGAINST AIRLINE EMPLOYEES. – No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation,

> terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) –

49 U.S.C.A. § 42121. And Section 806 of SOX provides:

> (a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES. – No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee –

18 U.S.C.A. § 1514A.

AIR 21's initial operative paragraph (a) is in the form "no air carrier or contractor or subcontractor of an air carrier . . . may . . . discriminate." In Section 806, Congress included the same operative paragraph and form, "no [public company] . . . or any officer, employee, contractor, subcontractor, or agent . . . may . . . discriminate." In Section 806, Congress added "officer," "employee," and "agent" to the list of actors prohibited from retaliating against whistleblowers in violation of Section 806. Both statutes include

contractors and subcontractors within their definitions of employers, but neither AIR 21 nor Section 806 explicitly define employees covered under the respective statutes. Nevertheless, AIR 21 has long been interpreted to cover employees of contractors and subcontractors.[18] The same goes for the PSIA – it

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[18] *See generally Evans v. Miami Valley Hosp.*, ARB Nos. 07-118, -121; ALJ No. 2006-AIR-022 (ARB June 30, 2009). In AIR 21 paragraph (d), Congress expressly excluded employees of air carriers, contractors, and subcontractors who engaged in deliberate violations of the law from coverage under the statute. 49 U.S.C.A. § 42121(d). By inference, Congress must have considered paragraph (a) to include employees of contractors and subcontractors or else it would have no need to exclude certain employees of contractors or subcontractors in paragraph (d) from coverage in paragraph (a).

Congress did not include this interpretive paragraph in Section 806. But the omission of this paragraph does not suggest that Congress intended the two coverage provisions to differ on this point, i.e., to exclude employees of contractors from Section 806 coverage. The legislative history of Section 806 indicated that Congress felt that another phrase, "lawful act," excluded those who were guilty of violations from coverage thus precluding the need to include a paragraph similar to (d) from AIR 21 in Section 806. The Senate Report accompanying the whistleblower amendment stated:

> Section 6 of the bill would provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company. . . .
>
> This bill would create a new provision protecting employees when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, their supervisors (or other proper people within a corporation), or parties

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contains a definition of employer that includes a contractor or subcontractor but no definition of employee. Like AIR 21, it has nonetheless been interpreted to cover employees of contractors and subcontractors. *See generally Rocha v. AHR Util. Corp.*, ARB No. 07-112, ALJ Nos. 2006-PSI-001, -002, -003, -004 (ARB June 25, 2009).

For over 20 years, the ERA has been interpreted to include employees of contractors within its coverage, despite the fact that, like Section 806, it contains no statutory definition of "employee." In *Hill v. Tenn. Valley Auth.*, Nos. 1987-ERA-023, -024 (Sec'y May 24, 1989), the Secretary provided a detailed analysis of why employees of one of TVA's contractors had standing to sue TVA under the ERA. The Secretary explained that the ERA's statutory language was not limited in terms to retaliation against any *specific* employer's employees, thereby evincing a congressional intent to extend whistleblower protection beyond the traditional employer-employee relationship. Citing the magnitude of potential danger from the nuclear power industry and the fact that on-site employees of contractors are an important source of information about nuclear safety, the Secretary

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in a judicial proceeding in detecting and stopping actions which they reasonably believe to be fraudulent. Since the only acts protected are "lawful" ones, the provision would not protect illegal actions, such as the improper public disclosure of trade secret information.

S. Rep. 107-146, 2002 WL 863249 at **18-19 (May 6, 2002).

recognized a compelling need to afford them protection under the statute. Given the ERA's remedial nature and the attendant need to liberally construe it, the Secretary reasoned that excluding employees of contractors from coverage would frustrate the statute's remedial purposes. *See also St. Laurent v. Britz, Inc.*, 1989-ERA-015, slip op. at 2 (Sec'y Oct. 26, 1992) ("Jurisdiction here does not depend upon a direct employer-employee relationship, but derives from the construction and application of the statute."). This reasoning applies with equal force in the context of Section 806.

Because these statutes share similar statutory language, legislative intent, and broad remedial purpose, they should be interpreted consistently. *See Poulos v. Ambassador Fuel Oil Co.*, No. 1986-CAA-001, slip op. at 5-7 (Sec'y Apr. 27, 1987); *Goldstein v. Ebasco Constructors, Inc.*, No. 1986-ERA-036, slip op. at 4 (Sec'y Apr. 7, 1992). The Secretary and courts have routinely looked to precedent interpreting one whistleblower protection statute for guidance in ascertaining congressional intent in another one. *See Bozeman v. Per-Se Tech., Inc.*, 456 F. Supp. 2d 1282 (N.D. Ga. 2006) (citing *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 3d 1365, 1374 (N.D. Ga. 2004)). In enacting Section 806, Congress modeled the legislation on the ERA, AIR 21, and PSIA and used terms that had an accumulated settled meaning under those predecessor statutes. *See* 69 Fed. Reg. 52,105. We find that Congress intended to cover employees of contractors under Section 806.

The Respondent, several ALJs, and the First Circuit in *Lawson* have voiced concerns over the breadth of covering employees of any contractors, subcontractors, or agents without limitation. The ALJ in *Charles* concluded that, "[t]o state that any privately held company under contract with a publicly traded company is a covered employer creates an exceptionally broad interpretation that is outside the scope of the Act." *Charles*, ARB No. 10-071, slip op. at 6. This concern is unfounded for two reasons. First, we are obliged to interpret Section 806 broadly both because it is a remedial statute and the legislative history encourages us to do so. *See Johnson*, ARB No. 08-032, slip op at 16. Second, we note that although the theoretical coverage of employees of any contractors, subcontractors, or agents of public companies might be broad, Section 806 contains built-in limitations including (1) its specific criteria for employees to have a reasonable belief of violations of specific antifraud laws or SEC regulations and (2) its requirement that the protected activity was a causal factor in the alleged retaliation.

In sum, we hold that accountants employed by private accounting firms who in turn provide SOX-compliance services to publicly traded corporations are covered as employees of contractors, subcontractors, or agents under Section 806.

CONCLUSION

Accordingly, we **REVERSE** and **REMAND** this case to the ALJ for further proceedings. Because we remand on the coverage issue and the case did not go to hearing on the merits, DLA's cross-petition claiming that the ALJ failed to find that DLA would have terminated Spinner in the absence of protected activity would be inappropriate for agency review at this time. DLA is free to re-litigate this argument before the ALJ on remand. We **DENY** DLA's cross-petition for $1,000 in penalties against Spinner.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, concurring:

I concur with my colleagues in concluding that the whistleblower protection afforded by Section 806 of SOX, 18 U.S.C.A. § 1514A, applies to employees of contractors, subcontractors, and agents of publicly traded companies. I write separately because I am not convinced, in light of the contrary conclusion reached by the majority in *Lawson v. FMR, LLC*, 670 F.3d 61 (1st Cir. 2012), that my colleagues' analysis adequately addresses the basis for reaching the

conclusion that Section 806's protection is not limited to only employees of publicly traded companies.

At the time this case arose, Section 806(a) provided in pertinent part:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee (1) to provide information . . . which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire, radio, TV fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. . . .[19]

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[19] On July 21, 2010, Section 806(a) was amended pursuant to Section 929A of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1848 (2010), to read as follows (with the additional language provided by the Dodd-Frank amendments highlighted in italics:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934

(Continued on following page)

The Department of Labor regulations implementing Section 806, which the First Circuit concluded in *Day v. Staples*, 555 F.3d 42, 54 n.7 (1st Cir. 2009), are entitled to deference,[20] specifically provide that SOX's

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(15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)), *including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c)*, or any officer, employee, contractor, subcontractor, or agent of such company *or nationally recognized statistical rating organization*, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee (1) to provide information . . . which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire, radio, TV fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. . . .

In addition to adding nationally recognized statistical rating organizations to the listing of entities prohibited from retaliating against whistleblowers, the amendment clarified that reference in Section 806(a) to a company with a class of securities registered under section 12 or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 includes any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company. *See Johnson v. Siemens Bldg. Techs.*, ARB No. 08-032, ALJ No. 2005-SOX-015 (ARB Mar. 31, 2011).

[20] The regulations were adopted pursuant to the Department of Labor's authority to enforce Section 806 by formal

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whistleblower protection extends to employees of contractors, subcontractors, and agents of publicly traded companies. The regulations define "employee" to include "an individual presently or formerly working for a company or company representative . . . or an individual whose employment could be affected by a company or company representative," and define "company representative" to mean "any officer, employee, contractor, subcontractor, or agent of a company."[21] As explained in the preamble accompanying the regulations' promulgation, Section 806 is viewed by the Department as "protect[ing] the employees of publicly traded companies as well as the employees of contractors, subcontractors, and agents of those publicly traded companies."[22]

As the majority notes, consistent with the Department's understanding, the ARB has consistently rejected interpreting Section 806 as protecting only employees of publicly traded companies, repeatedly interpreting SOX to afford whistleblower protection to employees of contractors, subcontractors or agents

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adjudication. *See* 18 U.S.C.A. § 1514A(b)(1). Whether the DOL regulations are or are not entitled to *Chevron* deference, *cf. Lawson v. FMR LLC*, 670 F.3d at 81-82, the ARB is obligated to follow them. *See* 75 Fed. Reg. 3925 (Jan. 15, 2010).

[21] 29 C.F.R. § 1980.101.

[22] 59 Fed. Reg. 52,104; 52,105-52,106 (Aug. 24, 2004). This expansive definition of "employee" under Section 806 reflects decades of Department of Labor precedent extending coverage under analogous whistleblower statutes to employees of contractors. *See* discussion, *infra* pp. 30-31.

of publicly traded companies, regardless of the fact that the contractor, subcontractor or agent was not itself a publicly traded company. *See Charles v. Profit Inv. Mgmt.*, ARB No. 10-071, ALJ No. 2009-SOX-040 (ARB Dec. 16, 2011); *Funke v. Federal Express Corp.*, ARB No. 09-004, ALJ No. 2007-SOX-043 (ARB July 8, 2011); *Johnson v. Siemens Bldg. Techs.*, ARB No. 08-032, ALJ No. 2005-SOX-015 (ARB Mar. 31, 2011); *Klopfenstein v. PCC Flow Techs.*, ARB Nos. 07-021, -022; ALJ No. 2004-SOX-011 (ARB Aug. 31, 2009) (*Klopfenstein II*); *Kalkunte v. DVI Fin. Servs. & AP Servs.*, ARB Nos. 05-139, -140; ALJ No. 2004-SOX-056 (ARB Feb. 27, 2009); *Gale v. World Fin. Grp.*, ARB No. 06-083, ALJ No. 2006-SOX-043 (ARB May 29, 2008); *Kukucka v. Belfort Instruments Co.*, ARB Nos. 06-104, -120; ALJ Nos. 2006-SOX-057, -081 (ARB Apr. 30, 2008); *Klopfenstein v. PCC Flow Techs.*, ARB No. 04-149, ALJ No. 2004-SOX-011 (ARB May 31, 2006) (*Klopfenstein I*).

In reaching the contrary conclusion, that only employees of a publicly traded company are covered under Section 806, the ALJ in the instant case cited to and relied upon the ARB's decisions in *Flezar v. American Med. Ass'n*, ARB Nos. 07-091, 08-061; ALJ Nos. 2007-SOX-030, 2008-SOX-016 (ARB Mar. 31, 2009); *Paz v. Mary's Center for Maternal Child Care*, ARB No. 06-031, ALJ No. 2006-SOX-007 (ARB Nov. 30, 2007), and *Flake v. New World Pasta Co.*, ARB No. 03-126, ALJ No. 2003-SOX-018 (ARB Feb. 25, 2004). However, as we pointed out in *Klopfenstein I*, the Board's decision in *Flake* (upon which both *Flezar* and

Pas [sic] rely) did not address the question presented by the instant case:

> The complainant in *Flake* named one respondent: a company that was neither registered under § 12 of the Securities Exchange Act nor, as we determined, required to file reports under § 15(d). That respondent company did not have a public parent. Because we concluded that the company was not required to file under either provision, we held that it was not subject to the Act, noting that "the whistleblower provisions of [the Act] cover only companies with securities registered under § 12 or companies required to file reports under § 15(d) of the Exchange Act." Because there was no public parent involved, we did not have occasion to discuss whether a non-public subsidiary of a public parent could be covered under the Act.[23]

Paz and *Flezar* similarly involved suit against non-publicly traded companies with no contractual or agency relationship to a publicly traded company.

Notwithstanding the ARB's consistent case authority to the contrary, the majority in *Lawson v. FMR, LLC*, 670 F.3d 61 (1st Cir. 2012), construed Section 806 to limit whistleblower protection to employees of publicly traded companies only. As the majority correctly notes, the ARB is not bound to accept the majority's holding in *Lawson* since the

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[23] *Klopfenstein I*, ARB No. 04-149, slip op. at 13.

instant case is reviewable in another circuit.[24] Nevertheless, in light of the First Circuit's decision I agree with the majority that it is imperative to fully explain the basis for our interpretation of SOX as affording protection to employees of contractors, subcontractors, and agents of publicly traded companies.

Analysis begins, as it must, with the plain language of Section 806.[25] It is clear from its text that Section 806's prohibition against retaliation extends to publicly traded companies, their subsidiaries,[26] and any officer, employee, contractor, subcontractor, or agent of any such company or its subsidiary.[27] It is far less clear from the plain language of Section 806 who is protected from such retaliation.

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[24] *See United States v. Mendoza*, 464 U.S. 154, 160 (1984); *Brizendine v. Cotter & Co.*, 4 F.3d 457, 462 n.4 (7th Cir. 1993); *Independent Petroleum Ass'n of America v. Babbitt*, 92 F.3d 1248, 1261-62 (D.C. Cir. 1996) (J. Rogers, dissenting).

[25] As the Supreme Court has observed on numerous occasions, all statutory inquiries must begin with the language of the statute. *See, e.g., Williams v. Taylor*, 529 U.S. 420, 431 (2000); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.* 447 U.S. 102, 108 (1980). *See also* SINGER AND SINGER, 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46.1 (7th Ed.).

[26] *See Johnson*, ARB No. 08-032.

[27] *See Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 6 (1st Cir. 2006) (Section 806 "makes clear that the misconduct it protects against is not only that of the publicly traded company itself, but also that of 'any officer, employee, contractor, subcontractor, or agent of such company' who retaliates or otherwise discriminates against the whistleblowing employee.")

The statute affords protection to "an employee" who engages in whistleblower activity without defining what is meant by "employee."[28] This lack of definition leaves the text of Section 806(a) fraught with seemingly irreconcilable complexity in terms of employment relationships. One possible reading of the statute results in extending whistleblower protection to "an employee" of "any officer, employee, contractor, subcontractor, or agent" of a publicly traded company. However, this reading on its face results in the seemingly improbable extension of protection to an *employee of an employee* or *an employee of an officer* of a public company.[29] At the same time, it requires an equally constrained reading of the statute's language to conclude that its protection is

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[28] The majority in *Lawson* draws a distinction between publicly traded companies and the other identified entities by categorizing the former as "employers" and the latter as "representatives of such employers." *Lawson*, 670 F.3d at 68. This is, however, a distinction without foundation. Section 806(a)'s opening phrase neither begins nor ends with a list of "employers," nor does Section 806(a) otherwise make this distinction.

[29] *See*, however, majority's discussion *infra*, pp. 7-8. The identification in Section 806(a) of "any officer, employee, contractor, subcontractor, or agent" of a publicly traded company is but a listing, consistent with provisions throughout Sarbanes-Oxley, of the non-public entities and individuals, in addition to public companies, whose activities are regulated by federal securities laws (see discussion, *infra*, pp. 28-29) and who are thus potentially liable for discriminatory action. See Department of Labor's commentary accompanying promulgation of Section 806's implementing regulations. 69 Fed. Reg. 52104, 52105 (Aug. 24, 2004).

limited to only employees of publicly traded companies. Section 806 prohibits publicly traded companies and the listed entities from discharging, demoting, suspending, threatening, harassing or in any other way discriminating against an employee with respect to the "terms and conditions of [his or her] employment." As the majority points out, because relief is afforded an aggrieved employee under the statute in the form of reinstatement to one's former employment and the award of back pay, it would be a rare occasion indeed for a contractor or subcontractor to comply with an order awarding such relief where in the equally rare occasion a contractor or subcontractor was found to have adversely affected the terms and conditions of an individual's employment with a publicly traded company. Because such nonpublic entities have no authority over the "terms and conditions" of a public company's employee's employment, an interpretation of Section 806(a) that identifies nonpublic entities such as contractors and subcontractors as entities prohibited from retaliating only against employees of public companies renders their inclusion surplusage. Similarly, if the contractor or subcontractor was merely acting on the publicly traded company's behalf in retaliating against the public company's employee, then the language of the statute prohibiting retaliation by contractors and subcontractors would be rendered superfluous since the acting entity would be barred from retaliation as a statutorily covered "agent" of the public company under Section 806(a). It is a fundamental rule of statutory interpretation that no construction be

adopted that would render statutory words or phrases "meaningless, redundant or superfluous."[30]

If any meaning can be derived from Section 806 with clarity, it is that there is nothing within the plain language of the provision that limits protection to only employees of publicly traded companies. As the majority pointes [sic] out, Congress could easily have limited whistleblower protection to employees of publicly traded companies simply by statutorily defining the term "employee" or by adding the words "*of such company*" after the term "employee." Yet Congress chose to do neither.[31] In the absence of plain language of limitation within Section 806(a), the conclusion that the whistleblower protection it affords is limited to employees of publicly traded companies is simply unsupportable. Nevertheless, the statute's extension of whistleblower protection to "an employee" is not without ambiguity, as demonstrated by the conflicting interpretations offered by the majority and dissent in *Lawson*.[32] Consequently, I agree with the

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[30] *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751-52 (1st Cir. 1985).

[31] "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate treatment." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotations omitted).

[32] "Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses." Singer, 2A SINGER AND SINGER, 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 45:2 (7th Ed.).

majority that our analysis does not end here, and that we necessarily must resort to additional cannons of statutory construction to define the scope of employee protection under Section 806.

Consideration is thus given to the title of Section 806 within which Subsection 806(a) is housed[33] and the caption of Subsection 806(a) itself.[34] Neither, however, compels the conclusion that whistleblower protection is limited to only employees of publicly traded companies. Arguably both the title and the caption could be construed as limiting the protection Section 806 affords. However, while the Supreme Court has acknowledged that titles and captions may prove helpful aids in statutory interpretation, "[w]here the text is complicated and prolific," as is the case with SOX and Section 806, "headings and titles can do no more than indicate the provisions in a most general manner."[35]

My colleagues note that in the instant case the rule against treating statutory titles as controlling[36]

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[33] The title to Section 806 states that the section addresses "Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud."

[34] The caption found in the first line of the text of Subsection 806(a) similarly reads: "Whistleblower protection for employees of publicly traded companies."

[35] *Brotherhood of R.R. Trainsmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 528 (1947) (citations omitted).

[36] *See, e.g., United States v. Johnson*, 632 F.3d 912, 924 (5th Cir. 2011); *Massachusetts Ass'n of Health Maint. Orgs. v. Ruthhardt*, 194 F.3d 176, 180 (1st Cir. 1999); *United Transp.*

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"rings true." It is also true in the case before us that the statutory title and caption shed little light in clarifying the ambiguity found in the term "employee." To begin with, if the title and caption were interpreted as limiting protection to employees of publicly traded companies only, it would be "at the expense of the text itself."[37] If only employees of publicly traded companies are protected then, as previously discussed, it would leave the word "contractor" without any independent meaning. Of greater significance, however, is the fact that neither the title nor the caption describes the full scope of Section 806's provisions. Although Section 806(a) plainly extends coverage to two categories of public companies – those required to register pursuant to section 12 of the Securities Exchange Act of 1934 and those required to file reports under section 15(d) of the 1934 Act – only the first encompasses companies with publicly traded stock. Those required to file reports pursuant to section 15(d) are "public" only "in the sense that they have issued securities that may be sold to the public and are required to make periodic reports to their investors."[38] Although the title and caption make no reference to companies that are required to file reports, coverage under Section 806 is obviously not

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Union-Illinois Legislative Bd. v. Surface Transp. Bd., 169 F.3d 474, 479 (7th Cir. 1999).

[37] *Massachusetts Ass'n of Health Maint. Orgs.*, 194 F.3d at 180.

[38] *Lawson*, 670 F.3d at 66-67.

limited to "publicly traded companies" as the title and caption suggest. This point is accentuated by the recent Dodd-Frank amendments to Section 806 extending its prohibition against retaliation to any "nationally recognized statistical rating organization."[39] If Congress intended the title and caption to give meaning to the term "an employee," the title and caption would necessarily have been amended as part of the Dodd-Frank textual amendments to Section 806.

Further testament to the fact that the full scope of Section 806 is not described in the title or caption is the title's suggestion that SOX whistleblower protection is limited to "employees . . . who provide evidence of fraud." Yet, as the ARB recognized in *Sylvester v. Parexel Int'l*, the protection that SOX affords does not require in all instances that the employee provide evidence of fraud. Section 806 protects employees who provide information about conduct falling within three broad categories: (1) violations of specific criminal fraud statutes (18 U.S.C. §§ 1341, 1343, 1344, and 1348); (2) violations of any rule or regulation of the SEC; and (3) violations of federal law relating to fraud against shareholders. Only the first and third categories require evidence of fraud. "A violation of 'any rule or regulation of the Securities and Exchange Commission'

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[39] Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, §§ 922(b), (c), 929A, 124 Stat. 1376, 1848, 1852 (2010).

could encompass a situation in which the violation, if committed, is completely devoid of any type of fraud."[40]

If Section 806 was intended to not only protect employees of publicly traded companies, but also employees of their related entities, it would still be reasonable to use the wording found in the title and caption given that all protected employees would have some connection to publicly traded companies, even if indirectly. The broader coverage of Section 806 is obviously too complex for its title. Consequently, I am in full agreement with Judge Thompson's conclusion in *Lawson* that the title "merely describes a specific and common application of a more generally applicable statute."[41] I view the phrase "employees of publicly traded companies" as nothing more than a shorthand designation for ascertaining the typical employee protected under Section 806 rather than the identification of every covered employee.[42]

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[40] *Sylvester v. Parexel Int'l.*, ARB No. 07-123, ALJ No. 2007-SOX-039, slip op. at 20 (ARB May 25, 2011). *Accord Day*, 555 F.3d at 54-55.

[41] *Lawson*, 670 F.3d at 86 (J. Thompson, dissenting).

[42] Congress used similar shorthand in the caption to the whistleblower protection provision of AIR 21, 49 U.S.C.A. § 42121, after which Section 806 of SOX was modeled in large part. *See* 18 U.S.C.A. § 1514A(b)(2)(A), (C). *See also* S. Rep. No. 107-146, at 30 (2002). Section 42121(a) is entitled, "Discrimination Against Airline Employees." Yet, the ARB has interpreted the text of the section as affording whistleblower protection to employees of contractors and subcontractors as well as air

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Turning to the legislative history of SOX, I am in agreement with the majority in sharing Judge Thompson's view that nothing in that history indicates that Congress intended to limit whistleblower protection under Section 806 to only employees of publicly traded companies.[43] The Senate conference report accompanying passage of SOX indicates that a key purpose of Section 806 is "to protect whistleblowers who report fraud against retaliation *by their employers*,"[44] but there is no mention of any imposed limitation on which, in any, employers are covered. There are statements by key members of Congress evidencing an intent to protect employees of publicly traded companies.[45] However, the protection of

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carriers. 29 C.F.R. § 1979.101. *See Wallum v. Bell Helicopters Textron*, ARB No. 09-081, ALJ No. 2009-AIR-006 (ARB Sept. 2, 2011); *Nagle v. Unified Turbines*, ARB No. 11-004, ALJ No. 2009-AIR-024 (Mar. 30, 2012).

[43] *Lawson*, 670 F.3d at 86-87.

[44] S. Rep. No. 107-146, at *1 (2002) (emphasis added).

[45] *See, e.g.*, statements of Senator Leahy, Chairman of the Senate Judiciary Committee and a key sponsor of Section 806, that the provision "would provide whistleblower protection to employees of publicly traded companies who report acts of fraud," 148 Cong. Rec. S1787 (daily ed. Mar. 12, 2002), that "[a]lthough current law protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for employees of publicly traded companies who blow the whistle on fraud and protect investors," *id.* at S1788, and that Section 806 "was intentionally written to sweep broadly, protecting any employee of a publicly traded company who took such reasonable action to try to protect investors and the market." 149 Cong. Rec. S1725 (daily ed. Jan. 29, 2003). *See also* post-enactment statement of Sen. Cardin, 156 Cong. Rec.

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whistleblowers employed by public companies is not in dispute. The question is whether that protection is limited to only employees of public companies. Nothing in the congressional record expresses any intent to restrict Section 806 in this manner.[46]

S3349 (daily ed. May 6, 2010) ("[t]he whistleblower provisions of the Sarbanes-Oxley Act protect employees of the publicly traded companies").

[46] The Senate Judiciary Committee Report accompanying the Corporate and Criminal Fraud Accountability Act of 2002, the bill that became Title VIII of SOX of which Section 806 is a part, states that the provision "would provide whistleblower protection to employees of publicly traded companies." S. Rep. 107-146, at 13 (2002). However, it is not clear that this constitutes a statement that employees of non-public companies are specifically excluded from protection, or whether this is but a limited shorthand generalization. Similarly, in his introduction to the Senate Conference Report Senator Sarbanes stated that Sarbanes-Oxley "applies exclusively to public companies," *see* 148 Cong. Rec. S7350, 7351 (July 25, 2002), which on its face appears to suggest that only employees of public companies are protected, but just as easily could be interpreted to mean that Section 806 applies to public companies and those parties that act on their behalf (e.g., contractors, subcontractors, and agents) as opposed to private companies that provide no services to publicly traded companies. Moreover, Senator Sarbanes' introductory comment cannot in any way be construed as suggesting that SOX is limited to public companies, and thus that Section 806 does not extend to private companies. For example, SOX Section 307 applies to private attorneys who act as contractors or agents "in the representation of" a publicly traded company, and the creation of Public Company Accounting Oversight Board pursuant to Title I of SOX (Section 101 et seq.) necessarily applies to privately-held accounting and auditing firms doing work for publicly traded companies.

Revealing Congress's intent that whistleblower protection is *not* limited to only employees of public companies is the Senate Judiciary Committee Report accompanying adoption of Section 806, S. Rep. 107-146 (2002). As explained therein, the notorious "Enron debacle," which served as a major impetus in the enactment of SOX's whistleblower protection provision,[47] involved misconduct by not only the publicly-traded Enron Corporation but the "accounting firms, law firms and business consulting firms" (*i.e.*, privately-held contractors, subcontractors, and agents) who performed work for Enron.[48] Complicit in the shareholder fraud and subsequent cover-up in the face of investigation were not only Enron's corporate officers and directors but outside professionals "who helped create, carry out, and cover up the complicated corporate ruse when they should have been raising concerns."[49] Cited in particular was Arthur Anderson [sic], a private accounting and auditing firm retained by Enron. Arthur Anderson [sic] not only facilitated Enron in the fraud and cover-up, but stifled its own employees' attempts at "blowing the whistle" on Enron's violations. "[W]hen corporate employees at both Enron and Anderson [sic] attempted to report or 'blow the whistle' on fraud, [ ] they were discouraged

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[47] The Senate report labeled the "Enron debacle" a "case study exposing the shortcomings in our current laws." S. Rep. 107-146, at 11.

[48] S. Rep. 107-146, at 4.

[49] *Id.* at 11.

at nearly every turn." It was not only Sherron Watkins, a senior employee at Enron, whose retaliation for whistle blowing was highlighted. Also noted was the removal by Arthur Anderson of one of its partners from the Enron account who expressed reservations about the firm's financial practices and retaliation against a financial advisor at UBS Pain Webber who claimed that he was fired for e-mailing his clients advising that they sell their Enron stock.[50] These examples, the Senate report stated, "expose a culture, supported by law, that discourages employees from reporting fraudulent behavior," resulting in a "corporate code of silence [that] not only hampers investigations, but also creates a climate where wrongdoing can occur with virtual impunity."[51] Viewing the consequences of this "corporate code of silence" as "serious and adverse" for investors in publicly traded companies and the stock market generally, Congress enacted Section 806 in order to "encourage and protect [employees] who report fraudulent activity that can damage innocent investors in publicly traded companies" by providing federal protection to private corporate whistleblowers.[52]

From the foregoing it is clear that Congress was concerned about the involvement of contractors, subcontractors, and agents of public companies, as

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[50] *Id.* at 5.

[51] *Id.*

[52] *Id.* at 5, 19.

well as the public companies themselves, in performing and disguising fraudulent activities. Congress was no less concerned about protecting employees of such entities who attempt to report such activities. In the wake of the Enron scandal, Congress sought to protect investors in publicly traded companies and restore trust in the financial markets "by ensuring that the corporate fraud and greed may be better detected, prevented and prosecuted."[53] Thus, while Section 806's immediate purpose is "to protect whistleblowers who report fraud against retaliation by their employers,"[54] this was not intended as an end in and of itself. Congress recognized the important role whistleblowers play in deterring corporate fraud and SEC violations, noting that "often, in complex fraud prosecutions, these insiders are the only firsthand witnesses to the fraud. They are the only people who can testify as to 'who knew what, and when,' crucial questions . . . in all complex securities fraud investigations."[55] As the ARB noted in *Johnson*, the principal sponsors of Sarbanes-Oxley and Section 806 "viewed protecting whistleblowers as crucial means for assuring that corporate fraud and malfeasance would be publicly exposed and brought to light from behind the corporate veil."[56]

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[53] *Id.* at 2.

[54] *Id.*

[55] *Id.* at 10.

[56] *Johnson*, ARB No. 08-032, slip op. at 14.

If the overriding purposes of Sarbanes-Oxley are to be met, employees of contractors, subcontractors, and agents of publicly traded companies must be afforded the same protection against retaliation by their employer that is afforded employees of publicly traded companies. To construe Section 806 otherwise would effectively insulate from liability investment advisors and other private entities that employ virtually all those who perform work for investment companies such as mutual funds that are required to file reports under Section 15(d) of the Securities Exchange Act. Nearly all mutual funds are structured such that they have no employees of their own, and instead contract with, and rely primarily upon, employees of privately-held investment advisors to function. Construing Section 806 as affording whistleblower protection to only employees of publicly traded companies would place employees of investment advisors, the very "insiders" whose reporting of fraud and securities violations Congress sought to encourage, outside the scope of SOX's whistleblower protection. Exclusion of the employees of investment advisors from whistleblower protection would thus defeat Section 806's primary purpose of protecting investors in mutual funds against fraud through the revelations of fraud and securities violations by "insiders" Section 806's protection is intended to encourage.[57]

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[57] Investment advisors to mutual funds constitute a substantial industry with nearly 157,000 employees managing more

(Continued on following page)

Beyond leaving employees of investment advisors unprotected for reporting potential fraud and securities violations relating to their client funds, construing Section 806 as only protecting employees of publicly traded companies would leave outside accountants, auditors, and lawyers – those most likely to uncover and comprehend evidence of potential wrongdoing – unprotected from retaliation. As previously discussed, Congress was clearly concerned about the role Arthur Anderson [sic] played in the Enron debacle and the retaliation exercised against one of its partners who attempted to blow the whistle. The ARB has previously acknowledged the difficulty in imagining that Congress intended to leave unprotected lawyers who are required under Section 307 of SOX to report evidence of material securities law violations.[58]

To the extent that the Dodd-Frank amendments to Section 806 provide any indication of Congressional intent, it is that broad and unlimited whistleblower protection was intended. It is a well-settled proposition of statutory construction that at the time of any amendments to an existing statute, Congress is presumed to be aware of court and

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than $12 trillion on behalf of investors. *See 2010 Investment Company Fact Book*, Chapter 1 (available at http://www.icifactbook.org/pdf/2010_factbook.pdf).

[58] *See Jordan v. Sprint-Nextel Corp.*, ARB No. 06-105, ALJ No. 2006-SOX-041, slip op. at 16 (ARB Sept. 30, 2009).

agency interpretations of the existing law.[59] At the time of adoption of Dodd-Frank in 2010, the Department of Labor had issued notice-and-comment regulations explicitly providing that Section 806 applied to employees of contractors, subcontractors, and agents of publicly traded companies. Thus, as Judge Thompson insightfully pointed out in *Lawson*, in enacting Dodd-Frank "Congress had a miles-wide opening to nip Labor's regulation in the bud if it had wished to do so. It did not."

Consideration of the overall statutory framework of SOX lends further support to construing Section 806 broadly to include within its protective coverage employees of contractors, subcontractors and agents of public companies.

We begin our analysis in this regard at its most obvious statutory focal point: with a comparison of the language of Section 806(a) to the explicitly narrower anti-retaliation provision found at Section 501(a) of Sarbanes-Oxley. 15 U.S.C.A. § 78*o*-6(a)(1)(C) prohibits "a broker or dealer and persons employed by a broker or dealer who are involved with investment banking activities" from retaliating against "any securities analyst *employed by that broker or dealer or its affiliates*." (Emphasis added). Congress could

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[59] *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

have similarly limited the protection afforded under Section 806(a) but, as previously noted, chose not to do so; resulting in a compelling argument that Congress fully intended a broad extension of whistleblower protection under Section 806.[60]

Equally if not of greater significance to a proper construction of Section 806's employee protection coverage is the larger statutory context within which Section 806 exists. While Section 806's immediate purpose is, as previously noted, the protection of whistleblowers against retaliation by their employers, the provision was enacted as part of a broad and multi-faceted Congressional effort to close gaps in the securities laws that the Enron debacle exposed with the goal of protecting investors and restoring public confidence in the securities market.[61] In furtherance of this over-arching goal, Sarbanes-Oxley consists of

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[60] Regarding Section 1107, "[t]he other whistleblower provision found in [SOX]" of which the majority in *Lawson* took note, 670 F.3d at 71, there is no meaningful comparison that can be drawn. Unlike Section 806(a), which expressly affords whistleblower protection to individuals who are wronged, Section 1107, which amended 18 U.S.C.A. § 1513, is an obstruction-of-justice provision that imposes criminal sanctions *upon the wrongdoer* but affords no protection to the wronged individual.

[61] The Senate Judiciary Committee report accompanying adoption of the bill that became Title VIII of SOX, of which Section 806 is a part, describes the bill as "crucial" to "restoring trust in the financial markets by ensuring that corporate fraud and greed may be better detected, prevented and prosecuted." S. Rep. 107-146, at 2. *See Johnson*, ARB No. 08-032, slip op. at 12.

multiple means of combating fraud and protecting investors through numerous diverse and independent statutes and regulatory schemes "designed to improve the quality and transparency in financial reporting and auditing of public companies."[62] Titles I and II of SOX expand oversight and regulation of accounting firms and outside auditors who are not themselves employed by public companies in order to "protect the interests of investors and further the public interest in the preparation of . . . accurate[ ] and independent audit reports for companies the securities of which are sold to, and held by and for, public investors."[63] Title III, entitled "Corporate Responsibility," imposes requirements on publicly traded companies designed to ensure the independence of retained public accounting firms and other professional entities with respect to audits, financial reporting, and securities law compliance.[64] For example, recognizing the significant roles that attorneys and securities professionals can play in both preventing and participating in securities laws violations.[65] Congress included Section 307, which directs the SEC to issue rules regulating the conduct of attorneys retained by a public company in connection with matters involving the public

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[62] *Carnero*, 433 F.3d at 9.

[63] SOX § 101, 15 U.S.C.A. § 7211. *See also*, SOX §§ 102-108, 15 U.S.C.A. §§ 7212-7218; SOX §§ 201-206, 15 U.S.C.A. §§ 7231-7234, 15 U.S.C.A. § 78j-1(*g*)-(*l*).

[64] *See* SOX § 301, 15 U.S.C.A. § 78j-1; SOX §§ 302-308, 15 U.S.C.A. §§ 7241-7246.

[65] *See* S. Rep. No. 107-146, at 2-5.

company's securities, regardless of whether the attorney is employed in-house by the company or contractually retained.[66]

Title IV of SOX, governing enhanced financial disclosure requirements, similarly imposes obligations on non-public entities in addition to publicly traded companies.[67] Title V defines codes of conduct and conflict of interest disclosure requirements applicable to outside securities analysts, registered brokers, dealers, and affiliates.[68] Title VI details the SEC's authority to censure or bar from practice outside securities professionals such as brokers, investment advisors, and dealers.[69] Title VII requires the Comptroller General and the SEC to report on securities violations by securities professionals (including public accounting firms, attorneys, brokers, dealers, investment advisors) and on whether investment banks and financial advisors assisted public companies in manipulating earnings or in otherwise

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[66] 15 U.S.C.A. § 7245 requires the SEC to issue rules, "for the protection of investors," setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in the representation of public companies, including the requirement that any attorney engaged on behalf of a public company internally report evidence of violations of securities law or breach of fiduciary duty or similar violation by the company or its agents. *See also* 17 C.F.R. § 205.

[67] *See* SOX §§ 401-408, 15 U.S.C.A. §§ 7261-7266.

[68] SOX § 501, 15 U.S.C.A. § 78*o*-6.

[69] *See* SOX §§ 602-604, 15 U.S.C.A. §§ 77t(g), 78d-3, 78*o*, 14 U.S.C.A. § 80b-3.

disguising their financial condition.[70] Finally, Titles VIII and IX of Sarbanes-Oxley contain broadly applicable provisions imposing criminal liability for securities fraud and obstruction of justice beyond publicly traded companies.[71]

Viewed within this context, it is readily apparent that the identification of publicly traded companies and other entities and individuals against whom Section 806's anti-retaliation bar applies is but a listing, consistent with provisions throughout Sarbanes-Oxley, of the public companies, non-public entities, and individuals whose activities are regulated by federal securities laws. The fact that Congress chose different mechanisms for regulating different non-public entities depending on their respective and varying roles and responsibilities under the securities laws does not negate extension of whistleblower protection under Section 806 to their employees. To the contrary, given the role Section 806 is intended to serve in achieving the larger purposes of Sarbanes-Oxley, whistleblower protection necessarily must be afforded employees of contractors, subcontractors, and agents of publicly traded companies. For example, pursuant to Section 307 of SOX, 15 U.S.C.A. § 7245, an attorney contractually retained as outside counsel to represent a public company before the SEC is obligated to internally report material violations of

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[70] *See* SOX §§ 701-705, 15 U.S.C.A. § 7201 note.

[71] *See* SOX §§ 802, 807, 902, 906, 18 U.S.C.A. §§ 1348, 1349, 1350, 1519, 1520.

the securities laws by the public company. Failure to do so will result in civil penalties, including censure and prohibition from practice before the SEC.[72] This provision would be rendered virtually meaningless without the whistleblower protection afforded by Section 806(a), particularly where the attorney with knowledge of securities violations is an employee of a law firm that has been contractually retained by a publicly traded company.

Within the overall statutory framework of SOX an even more compelling argument exists for interpreting Section 806(a) as extending whistleblower protection to employees of contractors, subcontractors, and agents when one considers the fact that companies required to file reports under Section 15(d) of the Securities Act such as mutual funds do not themselves have employees. Throughout Sarbanes-Oxley, Congress consistently imposes regulations, obligations, and sanctions upon the contractors, subcontractors, and agents of such companies.[73] These provisions and related SEC rules expanded the reach

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[72] *See* 17 C.F.R. § 205.

[73] *See, e.g.*, SOX §§ 101-107, 203-206, 602, 802 (regulating public companies' outside auditors and accountants); SOX §§ 201-202, 301 (requiring and regulating contracts between public companies and their outside auditors and accounting firms); SOX § 307 (regulating securities lawyers who are involved "in any way" in a public company's financial disclosures to investors); SOX § 501 (regulating public companies' investment bankers and securities underwriters); and SOX § 806 (regulating public companies' contractors).

of SEC regulations, identifying additional contractors and certain of their employees as covered persons under the securities laws in connection with their employer's contracts to provide to public companies services regulated by the securities laws. Congress's purpose in enacting SOX fully accords with a reading of the statute to afford whistleblower protection coverage under Section 806 to the employees of contractors, subcontractors, and agents who are covered persons under the securities laws.

The fact that Congress previously established a regulatory scheme governing the regulation of public investment companies, such as mutual funds, and the conduct of their investment advisors,[74] does not detract from our conclusion. Because of these prior enactments, obviously, SOX focuses little attention on the regulation of advisors to such public entities. However, it does not follow that, as a result, Section 806(a) does not afford whistleblower protection to employees of private companies under contract to provide investment advice to funds organized under the ICA. It is simply too large a segment of the securities industry to presume that Congress did not intend Section 806 to afford protection to employees of contractors or subcontractors retained as investment advisors. Congress could have easily provided an explicit exception for mutual funds/investment

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[74] *See, e.g.*, Investment Company Act of 1940 (ICA), 15 U.S.C.A. § 80a et seq.; Investment Advisors Act of 1940 (IAA), 15 U.S.C.A. § 80b et seq.

funds organized under the ICA, as it did in Section 405, if it had wanted to do so. But Congress did not do so. The ICA and SOX were both enacted to protect investors. It thus requires perverse logic to conclude that Congress intended through a non-intuitive and convoluted combination of two separate Acts, rather than by express statutory language, to exempt the one class of employees from whistleblower protection that would be aware of securities violations by public investment companies, i.e., employees of their contractors, subcontractors, and agents.

Finally, I join my colleagues in referencing the ARB's interpretation of analogous whistleblower statutes, which have been held to afford protection to employees of contractors and subcontractors. Section 806 was based in part on the Wendall H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).[75] The relevant provision of AIR 21 is entitled "Discrimination against airline employees," and reads: "No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee."[76] This structure parallels Section 806's: "No company . . . or any . . . contractor, subcontractor or agent of such company, may discharge . . . or in any other manner discriminate against an employee." Just as in Section 806, AIR 21 does not specify

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[75] *See* S. Rep. 107-146, at 26.

[76] 49 U.S.C.A. § 42121(a).

whether it protects employees of carriers only or whether it protects employees of contractors and subcontractors as well. Nevertheless, as the majority notes, the ARB has construed AIR 21's provision as extending whistleblower protection to employees of contractors and subcontractors of air carriers.[77] The Pipeline Safety Improvement Act of 2009 (PSIA), 49 U.S.C.A. § 60129(a), contains a definition of employer which includes a contractor or subcontractor but no definition of employee. Nevertheless, the PSIA has been interpreted as protecting employees of contractors and subcontractors.[78] Likewise, the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851(a), has also been interpreted to include employees of contractors within its protection despite the fact that, like Section 806, it contains no statutory definition of "employee."[79] These whistleblower statutes share similar statutory language and a legislative intent evidencing similarly broad remedial purposes. Consequently, the ARB has sought to interpret their respective provisions consistently.[80] Congress having

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[77] *See, e.g., Evans v. Miami Valley Hosp.*, ARB Nos. 07-118, -121; ALJ No. 2006-AIR-022 (ARB June 30, 2009).

[78] *See, e.g., Rocha v. AHR Utility Corp.*, ARB No. 07-112, ALJ Nos. 2006-PSI-001, -002, -003, -004 (ARB June 25, 2009).

[79] *See, e.g., Robinson v. Triconex Corp.*, ARB No. 10-013, ALJ No. 2006-ERA-031 (ARB Mar. 28, 2012); *Hill v. Tenn. Valley Auth.*, Nos. 1987-ERA-023, -024 (Sec'y May 24, 1989).

[80] *See, e.g., Goldstein v. Ebasco Constructors, Inc.*, 1986-ERA-036, slip op. at 4 (Sec'y Apr. 7, 1992); *Poulos v. Ambassador Fuel Oil Co.*, No. 1986-CAA-001, slip op. at 5-7 (Sec'y Apr. 27, 1987).

modeled Section 806 of SOX on the whistleblower protection provisions of the ERA, AIR 21, and PSIA, and employed terms, which have an accumulated settled meaning under those predecessor statutes, I can find no compelling reason to now depart from the Board's practice of construing these whistleblower laws in a consistent fashion.

Section 806 prohibits any "company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), . . . or any officer, employee, contractor, subcontractor, or agent of such company" from retaliating against "an employee" who engages in whistleblower protected activity. By this express language, Congress linked whistleblower protection coverage under Section 806 with the Securities Exchange Act provisions requiring publicly traded companies to fully disclose financial information to investors and the SEC. Congress clearly understood that in order to achieve the Act's overall purposes Section 806 necessarily had to afford whistleblower protection against all entities and individuals involved in securities related activities. Consequently, any reasonable interpretation of employee coverage under Section 806 must preserve this connection between protecting whistleblowers and ensuring compliance with securities law disclosure requirements.

Moreover, it goes without saying that Sarbanes-Oxley in general and Section 806 in particular are

remedial in nature. SOX was enacted "to address the systemic and structural weaknesses affecting our capital markets, which were revealed by repeated failures of auditing effectiveness and corporate financial and broker-dealer responsibility in recent months and years."[81] As part of the Corporate and Criminal Fraud Accountability Act of 2002, which became Title VIII of SOX, Section 806 is designed to remedy a company's firing of an employee for reporting fraud or other securities law violations, thereby facilitating SOX's overall purpose of protecting investors and capital markets.[82] The Supreme Court has repeatedly recognized that, "securities laws combating fraud should be construed 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes.'"[83] Thus where Section 806's language and the statutory scheme in which Section 806 resides support a broad reading that comports with its remedial purpose, we read Section 806 as protecting employees of contractors, subcontractors, and agents of public companies from retaliation for engaging in whistleblower protected activities.

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[81] S. Rep. No. 107-205, at 2 (July 3, 2002).

[82] S. Rep. No. 107-146, at 2.

[83] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386-87 (1983) (quoting *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 195 (1963)). *See also Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); SINGER AND SINGER, 3 SUTHERLAND STATUTORY CONSTRUCTION § 60:1 (7th ed. 2010).

Consequently, for the foregoing reasons I concur with the majority in reversing and remanding this case to the ALJ for further proceedings.

E. COOPER BROWN
Deputy Chief Administrative
Appeals Judge

STATUTES AND REGULATIONS INVOLVED

Section 806 of the Sarbanes-Oxley Act of 2002, 116 Stat. 802, provides:

PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES WHO PROVIDE EVIDENCE OF FRAUD.

(a) IN GENERAL. – Chapter 73 of title 18, United States Code, is amended by inserting after section 1514 the following:

"Sec. 1514A. Civil action to protect against retaliation in fraud cases

"(a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES. – No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee –

> "(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange

Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by –

"(A) a Federal regulatory or law enforcement agency;

"(B) any Member of Congress or any committee of Congress; or

"(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

"(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

"(b) ENFORCEMENT ACTION. –

"(1) IN GENERAL. – A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by –

"(A) filing a complaint with the Secretary of Labor; or

"(B) if the Secretary has not issued a final decision within 180 days of the filing of

the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

"(2) PROCEDURE. –

"(A) IN GENERAL. – An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

"(B) EXCEPTION. – Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

"(C) BURDENS OF PROOF. – An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code

"(D) STATUTE OF LIMITATIONS. – An action under paragraph (1) shall be commenced not later than 90 days after the date on which the violation occurs.

"(c) REMEDIES. –

"(1) IN GENERAL. – An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

"(2) COMPENSATORY DAMAGES. – Relief for any action under paragraph (1) shall include –

"(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

"(B) the amount of back pay, with interest; and

"(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

"(d) RIGHTS RETAINED BY EMPLOYEE. – Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.".

(b) CLERICAL AMENDMENT. – The table of sections at the beginning of chapter 73 of title 18, United States Code, is amended by inserting after the item relating to section 1514 the following new item: "1514A. Civil action to protect against retaliation in fraud cases.".

Section 1514A of 18 U.S.C., as amended by the Dodd-Frank Act, 124 Stat. 1848, 1852, provides in pertinent part:

> **Civil action to protect against retaliation in fraud cases**
>
> **(a) Whistleblower protection for employees of publicly traded companies.** – No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c), or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee. . . .
>
> **(2) Procedure.** – . . .
>
> **(D) Statute of limitations.** – An action under paragraph (1) shall be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation.

(E) Jury trial. – A party to an action brought under paragraph (1)(B) shall be entitled to trial by jury.

Section 42121(b)(1)(B) of 49 U.S.C. provides:

(B) Requirements. –

(i) Required showing by complainant. – The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(ii) Showing by employer. – Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(iii) Criteria for determination by Secretary. – The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor

in the unfavorable personnel action alleged in the complaint.

(iv) Prohibition. – Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

Section 1980.101 of 29 C.F.R. provides in pertinent part:

Company representative means any officer, employee, contractor, subcontractor, or agent of a company.

* * *

Employee means an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative.

Section 1980.102(a) of 29 C.F.R. provides:

(a) No company or company representative may discharge, demote, suspend, threaten, harass or in any other manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, has engaged in any of the

activities specified in paragraphs (b)(1) and (2) of this section.

OPPOSITION BRIEF

No. 12-3

IN THE
Supreme Court of the United States

JACKIE HOSANG LAWSON AND
JONATHAN M. ZANG,

Petitioners,

v.

FMR LLC, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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QUESTION PRESENTED

Section 806 of the Sarbanes-Oxley Act of 2002 provides "[w]histleblower protection for employees of publicly traded companies." 18 U.S.C. § 1514A. The question presented is whether the court of appeals correctly held that this provision applies only to employees of publicly traded companies.

LIST OF PARTIES

Respondents FMR LLC, Fidelity Management & Research Company, FMR Co., Inc., and Fidelity Brokerage Services LLC disclose the following information:

The named defendant FMR Corp. was merged into a limited liability company prior to the filing of the complaints in this action. FMR LLC is the surviving entity; FMR Corp. no longer exists.

FMR LLC is the parent of Fidelity Management & Research Company, FMR Co., Inc. and Fidelity Brokerage Services LLC. FMR LLC is not publicly held, and no publicly held corporation owns 10% or more of Fidelity Management & Research Company, FMR Co., Inc., or Fidelity Brokerage Services LLC.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED 1

STATEMENT 2

ARGUMENT 12

I. THERE IS NO CONFLICT OF DECISION WARRANTING THIS COURT'S REVIEW 12

A. All Federal Courts Agree That Section 806 Does Not Apply To Employees Of Private Contractors 12

B. The Asserted Conflict With An Administrative Adjudication Is Not Certworthy 15

II. THE COURT OF APPEALS' DETERMINATION THAT SECTION 806 DOES NOT APPLY TO EMPLOYEES OF PRIVATE CONTRACTORS IS CORRECT 22

A. The Decision Below Implements The Statutory Text And Structure 22

B. The Decision Below Is Entirely Consistent With The Statutory Purpose 28

CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

CASES

62 Cases of Jam v. United States,
340 U.S. 593 (1951).....17

Associated Gen. Contractors of Cal., Inc., v. Cal. State Council of Carpenters,
459 U.S. 519 (1983).....26

Board of Governors of Federal Reserve System v. Dimension Financial Corp.,
474 U.S. 361 (1986).....24

Bowen v. Am. Hosp. Ass'n,
476 U.S. 610 (1986).....18

Brady v. Calyon Securities (USA),
406 F. Supp. 2d 307 (S.D.N.Y. 2005).....14, 24

Brown & Root, Inc. v. Donovan,
747 F.2d 1029 (5th Cir. 1984).....27

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,
511 U.S. 164 (1994).....17

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984).....10, 16, 17, 18

Christopher v. Smithkline Beecham Corp.,
132 S. Ct. 2156 (2012).....21

Ervin v. Nashville Peace & Justice Ctr.,
No 3:07-0832, 2008 WL 4449920
(M.D. Tenn. Sept. 29, 2008).....14

Fleszar v. U.S. Dep't of Labor,
598 F.3d 912 (7th Cir.) 13

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,
130 S. Ct. 3138 (2010) 28, 29

In re Chapman,
166 U.S. 661 (1897) 24

INS v. National Center for Immigrants' Rights, Inc., 502 U.S. 183 (1991) 6, 22

Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296 (2011) 9, 21, 22, 26

Johnson v. United States,
529 U.S. 694 (2000) 24

Jones v. Harris Assocs. L.P.,
130 S. Ct. 1418 (2010) 30

Malin v. Siemens Med. Solutions Health Servs., 638 F. Supp. 2d 492 (D. Md. 2008) 27

Martin v. Occupational Safety & Health Review Comm'n,
499 U.S. 144 (1991) 18

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71 (2006) 25

Mohamad v. Palestinian Authority,
132 S. Ct. 1702 (2012) 24

Pegram v. Herdrich,
530 U.S. 211 (2000) 26

Pinter v. Dahl,
486 U.S. 622 (1988) 17

Samatar v. Yousuf,
130 S. Ct. 2278 (2010) 9

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 11, 16

Spinner v. David Landau & Associates, LLC,
Nos. 10-111, 10-115, 2012 WL 2073374
(DOL ARB May 31, 2012) 15

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008) 8, 22, 26, 32

Tumban v. Biomerieux, Inc.,
No. 1:06-cv-00442, 2007 WL 778426
(M.D.N.C. Mar. 13, 2007) 14

Zang v. Fidelity Mgmt. & Research Co.,
2007-SOX-00027, 2008 WL 7835900
(DOL ALJ Mar. 27, 2008) 1, 3

STATUTES

15 U.S.C. § 77a *et seq.* 2

15 U.S.C. § 78u-6 31

15 U.S.C. § 80a-1 *et seq.* 2, 30

15 U.S.C. § 80a-15 3

15 U.S.C. § 80b-1 *et seq.* 30

15 U.S.C. § 80b-3 29

15 U.S.C. § 7213 29

18 U.S.C. § 1513 31

18 U.S.C. § 1514A ..... *passim*

28 U.S.C. § 1254 1

42 U.S.C. § 5851 8

49 U.S.C. § 42121 .....8, 20, 21

49 U.S.C. § 60129 8

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) 27

REGULATIONS

29 C.F.R. § 1980.106 20

29 C.F.R. § 1980.107 20

29 C.F.R. § 1980.110 20

29 C.F.R. § 1980.112 20

69 Fed. Reg. 52,104 (Aug. 24, 2004) 15

75 Fed. Reg. 3925 (Jan. 15, 2010) 16

RULES

Sup. Ct. R. 10 15

OTHER AUTHORITIES

Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007) 18, 19

SEC Release for Proposed Rules Implementing the Whistleblower Provisions of § 21F of Securities Exchange Act of 1934 (May 25, 2011) 31

Senate Judiciary Committee Report, S. Rep. No. 107-146 (2002) 9

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-75a) is reported at 670 F.3d 61. The order granting interlocutory review (*see* Pet. App. 9a) is not reported. The memorandum and order of the district court (*id.* at 76a-133a) is reported at 724 F. Supp. 2d 141. The administrative decision dismissing petitioner Zang's original complaint is available at 2008 WL 7835900.

JURISDICTION

The decision of the court of appeals was entered on February 3, 2012. Rehearing was denied on April 6, 2012. Pet. App. 134a-135a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 806 of the Sarbanes-Oxley Act of 2002, entitled "[w]histeblower protection for employees of publicly traded companies," states in relevant part that "[n]o company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)), or any other officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner, discriminate against an employee in the terms and conditions of employment" because of certain protected activity. 18 U.S.C. § 1514A (Pet. App. 200a).

STATEMENT

Petitioners, former employees of *private companies*, sued under Section 806 of the Sarbanes-Oxley Act of 2002, which creates a private right of action for employees of certain *public companies* who suffer retaliation for engaging in protected activity. 18 U.S.C. § 1514A. The court of appeals held that their claims must be dismissed on the ground that Section 806 is limited by its text and structure to employees of public companies. Pet. App. 10a-18a.

1. Respondents are privately held companies that provide specified services to the Fidelity family of mutual funds. Fidelity Management & Research Company and FMR Co., Inc. serve as the investment adviser and sub-adviser to certain Fidelity mutual funds pursuant to contracts with the funds. They are responsible for directing the investments of each mutual fund consistent with the objectives, policies, and limits established by each fund. Fidelity Brokerage Services LLC is a broker-dealer that transacts in mutual fund securities but does not have contracts directly with the mutual funds. FMR LLC is the holding company for the other entities. Each respondent is privately owned, none has securities registered under Section 12 of the Exchange Act, and none is required to file reports under Section 15(d).

The Fidelity family of mutual funds includes a number of public investment companies registered with the Securities and Exchange Commission (SEC) under the Securities Act of 1933 and the Investment Company Act of 1940, 15 U.S.C. §§ 77a *et seq.* and 80a-1 *et seq.*, that are required to file reports under Section 15(d) of the Exchange Act. The funds, which are not parties to this case, are owned by their shareholders, governed by Boards of Trustees, and

required by law to engage investment advisers under written agreements approved annually. *See* 15 U.S.C. § 80a-15(c). Accordingly, the mutual funds are not owned or controlled by any of the respondent entities. Pet. App. 4a.

2. In July 2005, respondent FMR Co., Inc. terminated petitioner Jonathan Zang for inadequate performance of his responsibilities as a research analyst, including his failure to generate sufficient written research and to maintain appropriate communication with portfolio managers. Several months later, Zang filed a complaint with the Department of Labor (DOL), alleging that he had been retaliated against for raising concerns about supposed inaccuracies in a draft supplemental registration statement filed with the SEC by one of the mutual funds regarding its approach to compensating research analysts. Pet. App. 5a. Following an investigation, the DOL dismissed Zang's complaint, finding that he had not engaged in protected activity and was terminated for poor performance. Zang appealed to the DOL's Office of Administrative Law Judges, which dismissed Zang's appeal on the ground that he was not a covered employee under Section 806 because he was employed by a private company. *See id.* at 6a; *Zang v. Fidelity Mgmt. & Research Co.*, 2007-SOX-00027, 2008 WL 7835900 (DOL ALJ Mar. 27, 2008). Zang thereafter filed suit in federal district court. *See* 18 U.S.C. § 1514A(b)(1)(B) (providing that a complainant may bring an action for *de novo* review in federal district court if the DOL has not issued a final decision within 180 days).

Petitioner Jackie Lawson's complaint arose from respondent Fidelity Brokerage Services LLC's decision to promote a highly rated employee instead of Lawson, a lesser performer. Angered that she was

passed over and that a former peer was now her supervisor, Lawson became hostile toward her outgoing supervisor, neglected some of her job responsibilities, and openly defied her new supervisor. She also raised the first of the four complaints at issue in this case. Ultimately, Lawson resigned her employment in September 2007, claiming that she had been denied the promotion and constructively discharged for filing protected complaints concerning internal cost allocations used for fund profitability calculations relating to Fidelity's brokerage business. (Contrary to Lawson's contentions, *see* Pet. 4, this issue could not have affected the investment adviser's profits or the actual determination of fees paid by fund investors.) Before the DOL could complete its investigation of her complaint, Lawson filed suit in federal district court. *See* 18 U.S.C. § 1514A(b)(1)(B).

3. Respondents moved to dismiss both complaints on the ground, among others, that Lawson and Zang (as employees of private companies) were not "employees" within the meaning of the Sarbanes-Oxley whistleblower provision. The district court, addressing the two cases jointly, denied the motions, ruling that Section 806 encompasses employees of private companies that are contractors or subcontractors of public companies, but—according to a "limiting principle" created by that court (*see* note 2, *infra*)—only when such employees engage in whistleblowing relating to fraud against shareholders of those public companies. Pet. App. 96a-123a. The district court certified this ruling pursuant to 28 U.S.C. § 1292(b), and the court of appeals granted a petition for interlocutory review. *See* Pet. App. 9a (citing *Lawson v. FMR LLC*, No. 10-1944 (1st Cir. Oct. 25, 2010)).

4. The court of appeals reversed and ordered dismissal of the complaints. Based on a thorough review of the text of Section 806, the title and caption of the provision, other provisions of Sarbanes-Oxley, other whistleblower statutes, this Court's precedents, and pre- and post-enactment legislative history, the majority concluded that "only the employees of the defined public companies are covered" by the whistleblower provision. Pet. App. 17a.

a. *Text of Section 806*: The court of appeals held that the term "employee" in Section 806 refers only to employees of public companies. Pet. App. 17a. Although the parties disputed how broadly the term should be defined, the court determined that congressional intent was clear when the word "employee" was read in conjunction with the surrounding text. *See id.* at 16a-17a.

The court explained that Section 806 "first identifies covered employers: those with a class of securities registered under section 12 of the 1934 Act or those that file reports with the SEC pursuant to section 15(d) of the 1934 Act." Pet. App. 17a. Such public companies, the court explained, may not retaliate (*i.e.*, discharge, demote, threaten, harass, or in any other manner discriminate in the terms and conditions of employment) "against their own employees who engage in protected activity." *Ibid.* Section 806 further enumerates a list of representatives of such employers, including contractors and subcontractors, that "are also barred from retaliating against employees of the covered public-company employer who engage in protected activity." *Id.* at 18a.

The court of appeals rejected petitioners' contention that "employee" includes both the employees of public companies and employees of the public com-

panies' officers, employees, contractors, subcontractors, and agents. Pet. App. 15a. According to petitioners, "because [Section 806] forbids retaliation *by* 'any officer, employee, contractor, subcontractor, or agent,' of a public company, that provision must forbid retaliation *against* an employee of a contractor, subcontractor, or agent to a public company." *Id.* at 18a. The court noted that "[a]s a matter of logic, the conclusion does not follow from its premise." *Ibid.*

Moreover, "[a]s a matter of language," the court explained, "the argument ignores its implication: if an employee of 'any' contractor, subcontractor, or agent is protected, Congress must, by the same reasoning, have intended to protect the employee of 'any' officer or employee of a public company." Pet. App. 18a. That reading would create absurdities and provide sweeping coverage. *Ibid.* The court therefore concluded that "Section [806]'s list of company representatives serves . . . to ensure an employee of a public company is covered under the provision if he or she were harassed by officers, other employees, or contractors or subcontractors to the public company for reporting fraud in that public company." *Ibid.*

b. *Title and Caption*: The court of appeals further explained that the title of Section 806—"Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud"—and the caption of the whistleblower-protection provision—"Whistleblower protection for employees of publicly traded companies"—were "explicit guides" to the limited coverage of Section 806. Pet. App. 19a-20a.

Relying on the reasoning and principles of construction set forth in *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991), the court of appeals concluded that Section 806's generic refer-

ence to "employee" should be read as a reference to the "employees of publicly traded companies" identified specifically in the section's caption. Pet. App. 21a. The court rejected petitioners' contention that the reference to "employees of publicly traded companies" in the title and caption was simply "shorthand" that neglected to mention all employees covered by the provision. That reading, the court explained, "is contradicted by the plain words" of the title and caption, which were "not ambiguous" and were intended to clarify—"not to add to any ambiguity in the text." *Id.* at 22a.

c. *Other Statutory Provisions*: Based on the court of appeals' plain reading of the text, it did "not think there [was] any ambiguity left," but held that, even if there were, "other rules of statutory interpretation would lead [it] to the same result." Pet. App. 22a. The court held that other provisions of Sarbanes-Oxley, one providing broader whistleblower protection and others regulating nonpublic entities (including investment advisers, accountants, and lawyers) confirm the conclusion that Congress intended Section 806 to have limited coverage. *See id.* at 22a-28a. The court stated that petitioners' attempt to expand the private right of action to employees of nonpublic companies would be contrary to Congress's decision to implement different regulatory mechanisms for different entities (*id.* at 23a, 26a), and "would provide an impermissible end run around Congress's choice to limit whistleblower protection" in Section 806 to employees of publicly traded companies (*id.* at 28a).

d. *Other Federal Statutes*: The court of appeals also determined that the Sarbanes-Oxley Act's reference to the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21)

weighed against petitioners' broad construction. Pet. App. 28a-31a. The whistleblower provision in AIR 21 prevents air carriers—and a limited class of contractors and subcontractors (those that, by contract, perform safety-sensitive functions for an air carrier)—from retaliating against an employee for engaging in protected activity. *Id.* at 29a-30a (citing 49 U.S.C. § 42121(a)). The court held that AIR 21's textual limitation on the types of covered contractors, combined with its limitation on the subject matter of covered complaints, precluded the anomalous results and excessive breadth resulting from petitioners' strained reading of Section 806. *Id.* at 30a-31a.

Similarly, the court contrasted the whistleblower-protection provisions of other federal statutes that explicitly extend coverage to employees of contractors of the entities regulated by those statutes. *See* Pet. App. 32a-33a (citing 42 U.S.C. § 5851(a)(1) & 49 U.S.C. § 60129(a)(1)). The court of appeals "view[ed] the fact that Congress was not similarly explicit in extending coverage to the employees of contractors, subcontractors, and agents in [Section 806] as evidence that Congress did not intend such coverage to exist." *Id.* at 33a.

e. *Supreme Court Precedents*: The court of appeals found further confirmation for its ruling in opinions from this Court regarding the proper construction of securities laws and the relationship between investment companies and their advisers. Pet. App. 33a. Specifically, this Court has "admonished the lower federal courts not to give securities laws a scope greater than that allowed by their text." *Id.* at 34a (citing *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008)).

The court of appeals also rejected petitioners' contention that the close relationship between investment companies and their advisers warranted extending the private right of action to investment advisers. The court of appeals noted that this Court recently declined to construe SEC Rule 10b-5 to subject investment advisers to liability for statements made in a mutual fund's prospectus. Pet. App. 35a (citing *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011)). In so doing, this Court acknowledged that mutual funds and their advisers are "legally separate entities" and that "[a]ny reapportionment of liability in the securities industry in light of the close relationship between investment advisers and mutual funds is properly the responsibility of Congress and not the courts." *Ibid.* Relying on *Janus*, the court of appeals reasoned that "[h]ad Congress intended to ignore that separation and cover the employees of private investment advisers for whistleblower protections, it would have done so explicitly. . . ." *Id.* at 36a.

f. *Legislative History*: Although noting that resort to legislative history was unnecessary given the clarity of the statutory language and the governing principles of statutory construction, the court of appeals "confirm[ed] its understanding of the text by examining the legislative history." Pet. App. 37a (citing *Samatar v. Yousuf*, 130 S. Ct. 2278, 2287 & n.9 (2010)). Contemporaneous legislative history confirmed that Section 806 was intended to "provide whistleblower protection to employees of publicly traded companies." *Id.* at 37a-38a (citing Senate Judiciary Committee Report, S. Rep. No. 107-146, at 2-5 (2002)).

In addition, subsequent legislative developments confirm the whistleblower provision's narrow reach.

Pet. App. 37a-46a. A bill was introduced to amend Section 806 explicitly to cover employees of investment advisers to mutual funds, but it was unsuccessful. *Id.* at 40a-43a. In the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Congress amended Section 806 explicitly to include employees of public companies' *subsidiaries*, but did *not* amend the statute to include contractors and subcontractors of public companies. *Id.* at 43a-46a.

5. The DOL and the SEC filed *amicus curiae* briefs in the First Circuit urging affirmance of the district court's decision. The court of appeals considered the agencies' views, but held that they were not entitled to deference.

First, no deference was warranted under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because neither the DOL nor the SEC had been given the authority to interpret the term "employee" in Section 806. Pet. App. 46a.

Second, even if the agencies had been delegated interpretive authority, the court of appeals would not defer to an administrative agency's contrary construction of the term "employee" in Section 806 because it was not ambiguous. Pet. App. 46a.

Third, the court held that regulations adopted by the Occupational Safety and Health Administration (OSHA) within the DOL were not entitled to deference because the regulations are procedural and not intended to provide interpretations of the statute. Pet. App. 49a. Indeed, the Secretary of Labor expressly told the court of appeals that the agency "does not have substantive rulemaking authority with respect to section 1514A," and thus "the Secretary is not asking for deference under *Chevron*

. . . for her procedural regulations." Br. for the Sec. of Labor as *Amicus Curiae* Supporting Affirmance, No 10-2240 at 18 n.8 (Apr. 8, 2011).

Fourth, OSHA's regulations were not entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), because the DOL's notice of rulemaking advancing the interpretation lacked the "power to persuade." Pet. App. 50a. Furthermore, the court noted, neither the DOL nor the SEC claimed *Skidmore* deference for the OSHA regulations. *See ibid.*

Fifth, the court of appeals concluded that the textual arguments advanced by the DOL, which simply "mirror[ed] the textual arguments of the [petitioners] and [were] not based on the DOL's 'specialized experience,'" were not entitled to deference. Pet. App. 51a (quoting *Skidmore*, 323 U.S. at 139).

Sixth, because the SEC lacks rulemaking or enforcement authority as to Section 806, the court of appeals stated that the SEC's views regarding that provision, whatever their form, "would be owed no deference in any event." Pet. App. 51a.

6. Judge Thompson dissented. Pet. App. 52a. In her view, extending whistleblower protection to employees of contractors would fit within both the specific whistleblower-protection purpose of Sarbanes-Oxley and its broader remedial purposes. *Id.* at 60a-61a. She argued that Section 806 confers whistleblower protection upon employees of contractors and subcontractors doing business with public companies.

7. The First Circuit denied rehearing en banc. Pet. App. 134a-135a. Judge Thompson dissented for the reasons stated in her panel dissent. *Id.* at 135a.

ARGUMENT

Section 806 of the Sarbanes-Oxley Act of 2002 creates a private right of action for employees of publicly traded companies who engage in protected activity. 18 U.S.C. § 1514A. Petitioners were not employees of publicly traded companies; they were employed by private companies that provided or whose affiliates provided services to public companies. The court of appeals therefore concluded that petitioners are outside the ambit of the statutory provision under which they sued. That decision is correct, and does not conflict with any decision of this Court or of any other court of appeals. It does not warrant further review.

I. THERE IS NO CONFLICT OF DECISION WARRANTING THIS COURT'S REVIEW

Every federal circuit to have considered the question has concluded that Section 806 of Sarbanes-Oxley is limited to employees of public companies. Petitioners' asserted conflict between the decision below and a single decision from an administrative tribunal is not a basis for certiorari review.

A. All Federal Courts Agree That Section 806 Does Not Apply To Employees Of Private Contractors

1. The courts of appeals are in agreement that the text of Section 806 limits the private cause of action to employees of public companies. As noted above, the First Circuit held that only employees of the defined public companies, not employees of contractors and subcontractors, may pursue a private civil action under Section 806. Pet. App. 17a.

The Seventh Circuit also has recognized that Section 806 applies to contractors of a public compa-

ny only when the contractor participates in a retaliatory act against the public company's employee. *See Fleszar v. U.S. Dep't of Labor*, 598 F.3d 912 (7th Cir.) (Easterbrook, C.J.), *cert. denied*, 131 S. Ct. 423 (2010). In that case, the Secretary of Labor declined to investigate Fleszar's allegations, concluding that the American Medical Association (AMA)—a nonprofit membership association that does not issue stock—was not a covered entity. *Id.* at 913. A DOL ALJ and the ARB affirmed. *Ibid.*

On appeal, Fleszar contended that the ALJ should have ordered the Secretary to conduct an investigation that might turn up facts showing that the AMA is a "contractor, subcontractor, or agent" of a covered public entity. 598 F.3d at 914.

The Seventh Circuit held that the Secretary of Labor was not legally obliged to assist Fleszar in investigating her claim. 598 F.3d. at 914-15. The court also rejected Fleszar's contention that Section 806 provides whistleblower protection to employees of any "contractor, subcontractor, or agent" of a public company. As Chief Judge Easterbrook explained:

> We don't share Fleszar's belief that the phrase "contractor, subcontractor, or agent" means anyone who has *any* contract with an issuer of securities. Nothing in [Section 806] implies that, if the AMA buys a box of rubber bands from Wal-Mart, a company with traded securities, the AMA becomes covered by [Section 806]. In context, "contractor, subcontractor, or agent" sounds like a reference to entities that participate in the issuer's activities. The idea behind such a provision is that a covered firm,

> such as IBM, can't retaliate against whistleblowers by contracting with an ax-wielding specialist (such as the character George Clooney played in "Up in the Air").

Id. at 915.

2. The federal district courts also are in agreement that, by its terms, Section 806 does not apply to employees of private contractors. *See Ervin v. Nashville Peace & Justice Ctr.*, No. 3:07-0832, 2008 WL 4449920, at *7 (M.D. Tenn. Sept. 29, 2008) ("[B]y its very terms, Section 806 applies only to employees of publicly traded companies"); *Tumban v. Biomerieux, Inc.*, No. 1:06-cv-00442, 2007 WL 778426, at *2 (M.D.N.C. Mar. 13, 2007) ("The Sarbanes-Oxley Act only applies to publicly traded companies").

In *Brady v. Calyon Securities (USA)*, then-district Judge Gerard Lynch rejected the claim of an analyst, who contended that he could bring a claim under Section 806 against his privately held employer because it "acted as [an] agen[t] and/or underwrite[r] of numerous public companies." 406 F. Supp. 2d 307, 318 (S.D.N.Y. 2005) (internal quotation marks omitted). Judge Lynch explained that the mere fact that the defendants may have acted as an agent for certain public companies was insufficient to bring them within the employment protection provisions of the Sarbanes-Oxley Act. *See ibid.* "Nothing in the Act," Judge Lynch explained, "suggests that it is intended to provide general whistleblower protection" to employees of "any privately-held employer, such as a local realtor or law firm, that has ever had occasion, in the normal course of its business, to act as an agent of a publicly traded

company, even as to employees who had no relation whatsoever to the publicly traded company." *Ibid.*

B. The Asserted Conflict With An Administrative Adjudication Is Not Certworthy

Petitioners do not even try to argue that the First Circuit's decision in this case conflicts with any other judicial decision. Instead, they argue that it conflicts with a single decision of the DOL's Administrative Review Board. That conflict is not a basis for certiorari review. *See* Sup. Ct. R. 10.

In *Spinner v. David Landau & Associates, LLC*, Nos. 10-111, 10-115, 2012 WL 2073374 (DOL ARB May 31, 2012), the ARB erroneously concluded that the private cause of action in Section 806 extends to employees of contractors and subcontractors of public companies. Although *Spinner* reached a different result than the court of appeals did here, the conflict does not warrant review since the ARB's decision is not an authoritative or persuasive construction of the statute. The ARB's analysis was controlled by the DOL's procedural regulations and is contrary to this Court's repeated holdings that policy considerations cannot override the statutory text. The *Spinner* decision also has not yet received judicial review by an Article III court.

Although the ARB purported to analyze many of the same indicia of congressional intent in *Spinner* as the First Circuit did in this case (*cf.* Pet. 19), the ARB's analysis was controlled by the DOL's regulations, which "are procedural in nature and are not intended to provide interpretations of the Act." 69 Fed. Reg. 52,104, 52,105 (Aug. 24, 2004). For that reason, the Secretary of Labor "admit[ted]" before the court of appeals that the regulations were "enti-

tled to no deference" under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and she did not claim deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Pet. App. 47a, 49a. Thus, the First Circuit properly afforded the DOL's regulations no weight in reaching its decision. *Id.* at 46a-51.

The ARB, by contrast, was "obliged to follow" the DOL regulations. Pet. App. 142a & n.6 (citing 75 Fed. Reg. 3925 (Jan. 15, 2010)); *see also id.* at 153a ("As noted above, the ARB is bound by the DOL regulations"). Thus, the "starting point" of the ARB's statutory analysis was "the language of the statute itself *and the implementing regulations construing the relevant statutory text.*" *Id.* at 148a (emphasis added and internal quotation marks omitted). In addition, the ARB rejected the court of appeals' statutory analysis in favor of "the commentary accompanying the DOL's regulations." *Id.* at 149a; *see also id.* at 153a (relying on the DOL's responses during the notice-and-comment phase of the rulemaking concerning the coverage of the provision).

Because the ARB's construction of the statutory text was controlled by the DOL's procedural regulations, it is not an authoritative construction of the statute. An ARB decision dictated by procedural regulations has no more authority or persuasive value than the underlying regulations themselves.

The ARB's decision in *Spinner* also lacks persuasive force because it is contrary to this Court's precedents cautioning against expansive construction of statutes based on a perceived remedial purpose. According to the ARB, Section 806 must be read to protect whistleblowing by employees of contractors and subcontractors to the public company in order to

promote the Sarbanes-Oxley Act's "overriding purpose of protecting investors." Pet. App. 161a; *see also id.* at 154a ("[D]enying coverage to employees of contractors, subcontractors, or agents runs counter to the goals of Section 806 and SOX generally"); *id.* at 166a ("[W]e are obliged to interpret Section 806 broadly both because it is a remedial statute and the legislative history encourages use to do so").

This Court repeatedly has warned against ignoring the statutory text in favor of an assessment of Congress's objectives and how best to implement them. The "broad remedial goals" of a statute are insufficient justification "for interpreting a specific provision more broadly than its language and the statutory scheme reasonably permit." *Pinter v. Dahl*, 486 U.S. 622, 653 (1988) (internal quotation marks omitted); *see also Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994) ("Policy considerations cannot override . . . the text and structure of the Act"); *62 Cases of Jam v. United States*, 340 U.S. 593, 600 (1951).

Congress definitively and expressly limited the private right of action created by Section 806 to employees of publicly traded companies. Neither the DOL's procedural regulations nor a perceived remedial purpose can justify expansion of the plain language of Section 806. Thus, the ARB's contrary construction is not entitled to any deference. Tellingly, petitioners do not contend otherwise.

Even if the text were ambiguous, the ARB's decision still would not be entitled to deference. Deference is not warranted where Congress has not given an agency primary responsibility over a statute. *See Chevron*, 467 U.S. at 845 (deference to an agency's construction of an ambiguous statute is warranted if

it "represents a reasonable accommodation of conflicting policies that *were committed to the agency's care*") (emphasis added and internal quotation marks omitted); *see also Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 642 n.30 (1986) (plurality opinion) (there is "not the same basis for deference predicated on expertise" where a statute is administered by multiple governmental agencies).

The DOL has neither primary responsibility for administering Sarbanes-Oxley nor substantive rulemaking authority to interpret Section 806. Although the DOL has authority to adjudicate complaints under Section 806, Sarbanes-Oxley provides for *de novo* judicial review of certain complaints *before* the agency issues a final order. *See* 18 U.S.C. § 1514A(b)(1)(B). Because the Act provides for overlapping adjudicative jurisdiction, the ARB cannot claim any special expertise in resolving statutory ambiguities (*see Chevron*, 467 U.S. at 843-45), or contend that Congress expected the ARB to use its adjudicatory power to play a policymaking role. *Cf. Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 154 (1991) ("Insofar as Congress did not invest the Commission with the power to make law or policy by other means, we cannot infer that Congress expected the Commission to use *its* adjudicatory power to play a policymaking role"). Thus, federal courts have independent authority to interpret Sarbanes-Oxley without deference to the ARB's interpretations.

Petitioners' sole authority for the notion that a conflict between an Article III appellate court and an administrative tribunal may warrant this Court's review is a practice treatise that does not support the proposition. *See* Pet. 19 (citing Eugene Gressman et al., *Supreme Court Practice*, 268 (9th ed. 2007)).

What the treatise actually says is that "[a]n issue may assume importance because the lower court decision is at war with *a well-established construction* given the statute by the administrative agency charged with its enforcement." *Supreme Court Practice*, *supra*, at 268 (emphasis added). That statement has no application here because the ARB's decision in *Spinner* falls far short of a well-established or authoritative administrative construction of the statute. Federal courts have unanimously rejected this open-ended reading. And, as demonstrated by the ALJ's dismissal of Zang's complaint, administrative tribunals have construed the statute the other way as well.

Moreover, petitioners have not cited a single case in which this Court has granted certiorari to review a conflict between a court of appeals decision and a decision of an administrative tribunal like the ARB, and we are aware of none. To the contrary, the Solicitor General has argued in analogous circumstances that conflicting judicial and administrative precedents do not warrant this Court's review: "The fact that the only conflict petitioner can identify is between the [ARB's] decision in this case on one hand and the decisions of two district courts on the other highlights why review by this Court is not warranted." Brief for Respondent in Opposition, *Platone v. U.S. Dep't of Labor*, No. 09-55, at 12 n.4 (Oct. 16, 2009).

ARB panel members, like other DOL decision makers, are part of the administrative process. The courts of appeals, which provide an independent review of the statutory scheme including its administrative implementation, are fully capable of resolving any inconsistencies created by an aberrant ARB decision. Indeed the *Spinner* decision itself has yet to

be reviewed by an Article III court. That divergent administrative determination, which is not entitled to deference, may yet be overturned on appeal.

Pursuant to statutes and procedural regulations governing the handling of whistleblower complaints, OSHA conducts an initial investigation and may either dismiss the complaint as meritless or make a finding of retaliation and order appropriate relief. 18 U.S.C. § 1514A(b)(2)(A); 49 U.S.C. § 42121(b)(2)(A). Either the complaining employee or the employer may seek *de novo* review of OSHA's initial decision before a DOL ALJ. 29 C.F.R. §§ 1980.106, 1980.107. Either party may seek discretionary review of the ALJ's decision by the ARB. 29 C.F.R. § 1980.110. If the ARB denies review, the ALJ's decision becomes the final agency action; if the ARB accepts review, the Board's decision becomes the final agency action. 29 C.F.R. § 1980.110(b).

Once the administrative process is complete, either party may seek review of the agency's final decision in a federal court of appeals. 49 U.S.C. § 42121(b)(4)(A); 29 C.F.R. § 1980.112(a). In addition, an employee may file a *de novo* action in federal district court if "the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant." 18 U.S.C. § 1514A(b)(1)(B). There is therefore ample opportunity for judicial correction (or confirmation) of administrative determinations. Review by this Court is not warranted since no Article III court has yet considered the ARB's decision in *Spinner*.

Petitioners do not contend that the ARB's decision in *Spinner* is entitled to deference in any federal court or protected from reversal on appeal; instead,

they contend only that ALJs outside the First Circuit will be bound to apply *Spinner*, and thus the ARB's decision will result in forum shopping between administrative and judicial adjudication. *See* Pet. 3, 19. Whatever the complainant's initial choice of forum, either party may seek review of the final decision in a federal court of appeals for the circuit in which the alleged violation occurred. 49 U.S.C. § 42121(b)(4)(A). That court of appeals, exercising *de novo* review over questions of law, will have ample opportunity to consider the plain language of the whistleblower provision, the statutory scheme, the legislative history, analogous statutes, and any agency claims of deference.[1]

Further percolation among the courts is especially appropriate here to allow Article III judges to consider the various contexts in which this question could arise, if indeed it ever arises again. In the decade since enactment of the Sarbanes-Oxley Act, the question concerning coverage of employees of contractors and subcontractors has arisen quite infre-

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[1] Petitioners make repeated references to the *amicus* briefs filed in the court below by the SEC and the DOL, but they nowhere dispute the First Circuit's conclusion that the Judiciary owes no deference to the positions taken in those briefs. *See* Pet. App. 46a-51a. That is because the court of appeals' conclusion was correct. *See Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156, 2168-70 (2012) (according no deference to a DOL *amicus* brief); *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2303-05 & n.8 (2011) (no deference due SEC's views on scope of private right of action). Because the agencies' views on the question presented are already known, are quoted in the petition, and concededly are entitled to no deference, there is no reason to delay resolution of this litigation by asking again for the views of the federal government.

quently, and this is the only such case involving mutual fund investment advisers and related entities. There are only a handful of pertinent court decisions construing Section 806, and they all point in the same direction. No conflict among judicial authorities has yet developed, and may never develop. Thus, there is no need for this Court's review.

II. The Court Of Appeals' Determination That Section 806 Does Not Apply To Employees Of Private Contractors Is Correct

The court of appeals correctly determined that Section 806's unadorned reference to "employees" should be understood in context as comprising employees of the same public companies identified as covered employers in the provision, as well as in the title and caption. Although resort to additional indicia of congressional intent is unnecessary where, as here, the text is clear, the court of appeals correctly concluded—in accordance with the rules of interpretation announced by this Court—that the statutory scheme, legislative history, and other interpretive indicia confirm the natural reading of the text.

A. The Decision Below Implements The Statutory Text And Structure

The petition glosses over the court of appeals' thorough statutory analysis. Petitioners' statement of the case contains only a single paragraph discussing the detailed decision below. *See* Pet. 7-8. Moreover, petitioners do not cite or acknowledge *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991), *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), or other Supreme Court

precedents that were central to the court of appeals' analysis. The petition also fails to grapple with the absurdities that would result from petitioners' construction of the statute, as well as the adverse practical consequences of imposing massive liability and costs on private businesses that Congress expressly sought to avoid.

In marked contrast to the decision below, petitioners' effort to read Section 806 as conferring a private right of action to employees of private companies contorts the statutory language and violates basic principles of statutory construction.

Petitioners' *only* argument based on the plain text of the statute is the conclusory assertion that "Section [806] expressly applies to contractors and subcontractors of these public companies, as well as to the public companies themselves." Pet. 12. That is true as far as it goes; but it says nothing about whether the contractors' and subcontractors' *employees* are granted rights of action. As the court of appeals correctly noted, construing the term "employee" to include employees of a public company's officers, employees, contractors, subcontractors, and agents is not justified as a matter of logic or grammar. Pet. App. 18a. The fact that the statute prohibits retaliation *by* "any officer, employee, contractor, subcontractor, or agent" of a public company does not mean that the provision must forbid retaliation *against* an employee of an officer, employee, contractor, subcontractor, or agent. *Ibid.*

According to petitioners, the phrase "any officer, employee, contractor, subcontractor, or agent of such company" identifies entities that would be precluded from retaliating against their *own* employees. Although a contractor, subcontractor, or agent of a pub-

licly traded company might have their own employees, an officer or employee of a publicly traded company would not be expected to have their own employees. A proffered interpretation that produces such anomalies defies basic rules of statutory construction. *Johnson v. United States*, 529 U.S. 694, 707 n.9 (2000) ("[N]othing is better settled, than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion") (quoting *In re Chapman*, 166 U.S. 661, 667 (1897)).

By providing that "officers, employees, contractors, subcontractors, or agents" may not discriminate against employees of public companies, Congress did not "adop[t] a general whistleblower protection provision" covering every employee of every privately held employer. *Brady*, 406 F. Supp. 2d at 318; *see also* Pet. App. 111a-115a. Extending whistleblower protection to the employees of privately held companies doing business with public companies would extend protection far beyond the scope envisioned by Congress.

Unable to articulate a coherent textual or structural defense of their position, petitioners are left to contend that a broad interpretation of Section 806 would further the investor-protection objectives of the Sarbanes-Oxley Act. *See* Pet. 21-33. But the perceived *purposes* of a statutory provision cannot override the *text* of the *statute* that Congress enacted. *See Mohamad v. Palestinian Authority*, 132 S. Ct. 1702, 1710 (2012) (rejecting broad reading of cause of action because "petitioners' purposive argument simply cannot overcome the force of the plain text"); *Board of Governors of Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 375 (1986).

Congress expressly limited the private right of action created by Section 806 to employees of publicly traded companies. Section 806 creates a particularly complex kind of private civil litigation—allegations of securities violations wrapped inside an employment-discrimination claim—that is expensive and burdensome for employers to defend against. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 80 (2006) (noting "widespread recognition" that securities fraud litigation "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general") (internal quotation marks omitted). Congress decided that the benefits outweighed the costs in the case of employees of public companies. But Congress reasonably declined to impose these extraordinary costs on a broad range of private companies.

Allowing petitioners' suits to proceed would upset the balance struck by Congress by exposing thousands of private companies that do business with public companies to a new type of employment litigation—regardless of the size of their workforce, the volume of their business, the nature of their business or relationship with the public company, or their capacity to understand and address complex questions under securities laws that, by definition, do not apply to them. Congress imposed burdens on public companies that assume greater regulatory responsibilities by accessing the capital markets. Expanding coverage to private contractors, in contrast, would expose many partnerships and small businesses to a

particularly expensive and potentially destructive form of civil liability.[2]

Sensitive to the "practical consequences of an expansion" of the class of litigants entitled to sue under a statute (*Stoneridge*, 552 U.S. at 163), this Court repeatedly has rejected an expansive reading of both express and implied causes of action justified by reference to broad policy objectives that would open the floodgates of litigation. *See, e.g.*, *Janus*, 131 S. Ct. 2296-99 (rejecting construction of private cause of action under SEC Rule 10b-5 that would permit investment adviser to be held liable for false statements included in mutual funds' prospectuses); *Stoneridge*, 552 U.S. at 164 (rejecting interpretation of Section 10(b) of the Securities Exchange Act that "would expose a new class of defendants to [litigation] risks"); *Pegram v. Herdrich*, 530 U.S. 211, 232-33 237 (2000) (refusing, given "doubt that Congress intended" a broad category of ERISA claims, to recognize a cause of action that would risk "upheaval" to businesses and "the efficiency of federal courts"); *Associated Gen. Contractors of Cal., Inc., v. Cal. State Council of Carpenters*, 459 U.S. 519, 530 (1983) (re-

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[2] Concerned about this massive expansion of liability, the district court adopted and applied a "limiting principle," under which Section 806 would apply only when an employee's complaint pertains to fraud against shareholders of a public company. Pet. App. 115a. That effort (which petitioners do not defend in this Court) addresses the scope of protected activity—not the scope of employee coverage—and therefore does not meaningfully limit the range of possible defendants. In any event, the imposition of such limits is a legislative function, not a judicial one, and the perceived need to create such a limitation only confirms that the sweeping expansion of liability advocated by petitioners is something Congress did not provide.

jecting "open-ended" construction of Section 4 of the Sherman Antitrust Act).

If Congress were persuaded that the First Circuit's adherence to the plain text and structure of Section 806, which excludes employees of privately held companies, was bad policy, then it is the Legislature's prerogative to adjust the statutory scheme to cover additional situations. This is illustrated by an example provided by petitioners' *amicus*: After the Fifth Circuit held that an employee's filing of purely internal reports did not constitute protected activity under the Energy Reorganization Act (*Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984)), Congress amended the ERA to protect internal whistleblowing explicitly. *See* NWC Br. 7.

Indeed, Congress has already amended the coverage of Section 806 once. Federal courts and DOL ALJs disagreed on whether Section 806 applied to wholly owned subsidiaries of public companies. *See, e.g., Malin v. Siemens Med. Solutions Health Servs.*, 638 F. Supp. 2d 492, 501 (D. Md. 2008). The Dodd-Frank Act amended Section 806 to explicitly include certain subsidiaries of publicly traded companies and statistical rating organizations. Pet. App. 204a-205a (Pub. L. No. 111-203, §§ 922(b), 929A, 124 Stat. 1376, 1848, 1852 (2010)). While that amendment has no application here, it puts to rest the suggestion—made implicitly by petitioners and explicitly by their *amicus*—that this Court should "impute[] a protection into laws that have no words creating it." NWC Br. 4. The Sarbanes-Oxley Act has express words creating whistleblower protection; but they do not apply in the circumstances of this case.

B. The Decision Below Is Entirely Consistent With The Statutory Purpose

Petitioners contend that the First Circuit's construction of Section 806—itself a small part of a comprehensive financial reform package—is bad policy because, according to petitioners, it will (1) create a regulatory loophole for accounting firms and other professionals; (2) have detrimental consequences for the mutual fund industry; and (3) leave whistleblowers unprotected. Such policy determinations are for the Legislature to address, and petitioners' parade of horribles fails to account for the numerous other statutory and regulatory provisions that operate in these areas.

1. Petitioners' suggestion that the First Circuit's decision would create a regulatory loophole by rendering the anti-retaliation provision inapplicable to accounting firms ignores the broader context of Sarbanes-Oxley. In particular, petitioners fail to recognize that Congress *separately* and *comprehensively* addressed the conduct of outside accountants by creating a regulatory agency and adopting detailed provisions regulating corporate auditors in their representation of public companies.

As this Court recently acknowledged, Sarbanes-Oxley "introduced tighter regulation of the accounting industry under a new Public Company Accounting Oversight Board." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3147 (2010). The Board is charged with "regulat[ing] *every detail* of an accounting firm's practice, including hiring and professional development, promotion, supervision of audit work, the acceptance of new business and the continuation of old, internal inspection

procedures, professional ethics rules, and 'such other requirements as the Board may prescribe.'" *Id.* at 3148 (citing 15 U.S.C. § 7213(a)(2)(B)) (emphasis added). Because Congress explicitly addressed concerns about accountants in other provisions of the Sarbanes-Oxley Act, those concerns do not warrant judicial expansion of the civil cause of action in Section 806, and certainly not to mutual fund investment advisers.

Moreover, petitioners' effort to equate accounting firms with investment advisers is unfounded. Pet. 22. Sarbanes-Oxley primarily was enacted to address accounting scandals at publicly traded companies, not wrongdoing by mutual funds that may have held those companies' stock or investment advisers to those mutual funds. Accounting firms are engaged by public companies to conduct audits and render opinions about financial statements of their client companies, and their opinions form a portion of these companies' publicly filed financial statements. Prior to the Sarbanes-Oxley Act, however, there was no nationwide regulator of public accounting firms. Investment advisers, by contrast, are engaged by mutual funds and other clients to provide proprietary investment advice, which is generally not shared with the public. In addition, all investment advisers of mutual funds (as well as other large investment advisers) have long been regulated by the SEC under the Investment Advisers Act of 1940. 15 U.S.C. § 80b-3.

2. Because investment advisers and their affiliates are separately regulated, petitioners' contention that the First Circuit's construction would have detrimental consequences for the mutual fund industry is incorrect. Specifically, petitioners contend that Section 806 must extend to investment advisers be-

cause these entities have "significant financial incentive to withhold information." Pet. 33. In fact, mutual fund advisers (only about half of which are privately held) are motivated to discover wrongdoing occurring at public companies.

Once again, petitioners' theory fails to recognize that Congress has *separately* and *comprehensively* regulated the incentives and conduct of investment advisers and other participants in the mutual fund industry. Under legislation in force for more than seven decades, investment companies and investment advisers are separate and distinct entities. The Investment Company Act, 15 U.S.C. § 80a-1 *et seq.*, and the Investment Advisers Act, 15 U.S.C. § 80b-1 *et seq.*, subject both investment companies and investment advisers to significant regulatory controls to address any concerns about the "potential for abuse inherent in the structure of investment companies." *Jones v. Harris Assocs. L.P.*, 130 S. Ct. 1418, 1422 (2010) (internal quotation marks omitted). Congress was well-aware of this legal framework and the fact that many employees in the mutual fund industry work for separately owned investment advisers. *See ibid.*

Because investment companies and their advisers are subject to pervasive federal regulation, including SEC supervision and enforcement authority, under the 1940 Acts, there is no basis to stretch Section 806 of the Sarbanes-Oxley Act to reach privately held companies in this arena.

3. An unstated premise of petitioners' argument is that if a whistleblower cannot invoke the civil suit provision of Section 806, he or she is unprotected by federal law. That premise fails to recognize that Congress has *separately* provided anti-retaliation

protections for employees of private companies who report potential violations of the securities laws to government officials.

Section 1107 of Sarbanes-Oxley, entitled "Retaliation Against Informants," imposes *criminal liability* on anyone who retaliates against a person for providing information about *any* federal offense to government officials. 18 U.S.C. § 1513. Unlike Section 806 of Sarbanes-Oxley, Section 1107 applies to *all* employers, not just public companies.

In addition, the Dodd-Frank Act creates a civil cause of action and a monetary reward system for whistleblowers. Section 922 of Dodd-Frank creates a private cause of action for individuals who are discharged or discriminated against by their employers for providing information to the SEC relating to a potential violation of the securities laws. 15 U.S.C. § 78u-6. Section 922 further requires the SEC to award whistleblowers monetary compensation for providing certain tips about possible securities law violations that lead to successful enforcement actions. *See also* SEC Release for Proposed Rules Implementing the Whistleblower Provisions of § 21F of Securities Exchange Act of 1934, at 18 (May 25, 2011) (asserting SEC enforcement authority over employers who retaliate against Section 922 whistleblowers).

Thus, an employee who makes protected reports to the SEC has a civil cause of action against her employer under Section 922 of Dodd-Frank (plus the possibility of a lucrative reward) and the employer could be subject to criminal liability for retaliating against the employee under Section 1107 of Sarbanes-Oxley. Because federal law protects and encourages external reporting, employees of both public

and private companies have sufficient incentive to report possible violations of the securities law to the SEC or other federal law enforcement officers. The congressional decision that private companies should "be pursued by the SEC and not by private litigants" should be respected. *Stoneridge*, 552 U.S. at 163.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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August 24, 2012

REPLY BRIEF

No. 12-3

In The Supreme Court of the United States

JACKIE HOSANG LAWSON and JONATHAN M. ZANG,

Petitioners,

v.

FMR LLC, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF

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TABLE OF CONTENTS

Page

I. The Conflict Between The First Circuit and The Administrative Review Board Warrants Review by This Court 1

II. The Decision of The First Circuit Is Clearly Incorrect 9

III. The Views of The ARB and The Department of Labor Are Entitled To Weight 12

Conclusion 14

TABLE OF AUTHORITIES

Page

CASES:

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 9

Fleszar v. U.S. Dep't of Labor, 598 F.3d 912 (7th Cir. 2010) 11

Food and Drug Administration v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 2

Kasten v. Saint-Gobain Performance Plastics Corp., 131 S.Ct. 1325 (2011) 12

Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29 (1983) 12

National Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co., 534 U.S. 327 (2002) 1

National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005) 1

Platone v. U.S. Dep't of Labor, 130 S.Ct. 622 (2009) 3

Spinner v. David Landau & Associates, LLC, 2012 WL 1999677 (ARB May 31, 2012) 1, 2, 3, 7, 12

U.S. v. Gaither, 533 F.Supp.2d 540 (W.D.Pa. 2008) 4

U.S. v. Lopez-De LaCruz, 431 F.Supp.2d 200 (D.P.R. 2006) 4

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

Section 15(d) 10

Section 806, Sarbanes Oxley Act 9, 10, 11

Section 922, Dodd-Frank Act 6

Section 1107, Sarbanes-Oxley Act 4

Section 12 of the Securities Exchange Act 10

15 U.S.C. § 78-6(h) 6

18 U.S.C. § 1513 4

18 U.S.C. § 1514A ..... *passim*

18 U.S.C. § 1514A(a) 10, 11

18 U.S.C. § 1515(a)(4) 4

Communications Act 1

Dodd-Frank Act 5

Food, Drug and Cosmetic Act 2

Pole Attachments Act 2

BRIEFS:

Brief for Respondent in Opposition, *Platone v. U.S. Dep't of Labor*, No. 09-55 (Oct. 16, 2009) 3

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

Eugene Gressman, et al., *Supreme Court Practice* (9th ed. 2007) 2

National Commission on the Causes of the Financial and Economic Crisis in the United States, *The Financial Crisis Inquiry Report* (2011) 8

Securities and Exchange Commission, Division of Enforcement, Enforcement Manual, part 5.2 (March 9, 2012) 5

I. THE CONFLICT BETWEEN THE FIRST CIRCUIT AND THE ADMINISTRATIVE REVIEW BOARD WARRANTS REVIEW BY THIS COURT

There is no dispute that the First Circuit's interpretation of section 1514A in the instant case squarely conflicts with the decision of the Administrative Review Board in *Spinner v. David Landau & Associates, LLC*, 2012 WL 1999677 (ARB May 31, 2012). Respondents do not deny that any claimant may elect to proceed in the administrative process, rather than file suit in district court, and that the resolution of any such claim in the administrative process (except a claim arising in the First Circuit) will be governed by the ARB decision in *Spinner*. Because of the exceptional importance of section 1514A to the financial markets and to the interests of individual investors, the conflict between the First Circuit and the ARB warrants review by this Court.

(1) This Court has repeatedly granted certiorari to resolve an important conflict between a court of appeals and an administrative agency regarding the interpretation of the statute administered by that agency. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), this Court granted review after the Ninth Circuit rejected the Federal Communications Commission's conclusion that the sale of broadband Internet service is not a "telecommunications service" under the Communications Act. In *National Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 534

U.S. 327 (2002), the Court granted certiorari because the Eleventh Circuit had rejected the FCC's conclusion that a cable that provides broadband Internet service is a "pole connection" under the Pole Attachments Act. In *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), review was granted because the Fourth Circuit had overturned the FDA's conclusion that tobacco is a "drug" within the meaning of the Food, Drug and Cosmetic Act.

The parties agree that this Court does grant review when "[a]n issue ... assume[s] importance because the lower court decision is at war with a well-established construction given the statute by the administrative agency charged with its enforcement." (Br.Opp. 19) (quoting Eugene Gressman, et al., *Supreme Court Practice*, 268 (9th ed. 2007)). Respondents suggest that the interpretation of section 1514A unanimously adopted by the Administrative Review Board in *Spinner* is not "well-established" because several years earlier an administrative law judge construed section 1514A differently. (Br.Opp. 19). But it is the Administrative Review Board, not individual administrative law judges, which exercises the authority delegated by the Secretary of Labor to make the final administrative determination regarding both individual claims and the interpretation of section 1514A. The decision in *Spinner* was not a departure from previous ARB interpretations of section 1514A; the ARB noted in *Spinner* that four pre-*Spinner* ARB decisions had already held that

section 1514A applies to contractors of public companies. (Pet.App. 143a and n.8). The administrative interpretation of section 1514A in *Spinner* is deeply entrenched and will be binding on all administrative law judges in the future.

Respondents suggest that it is the position of the Solicitor General that review by this Court is never warranted by a conflict between a court of appeals and the administrative agency responsible for administering a statute, citing a footnote in the government's Brief in Opposition in *Platone v. U.S. Dep't of Labor,* 130 S.Ct. 622 (2009) (Br.Opp. 19). But that footnote asserted only that review was not warranted merely by the existence of a conflict between the ARB and "the decisions of two *district* courts." Brief for Respondent in Opposition, *Platone v. U.S. Dep't of Labor*, No. 09-55 at 12 n.4 (Oct. 16, 2009) (emphasis added). In the instant case, unlike *Platone*, the agency's interpretation of the statute in question was rejected by a court of appeals. In each of the cases cited above, moreover, it was the Solicitor General who urged that a court of appeals' rejection of an agency's position on an important question of law warranted review by this Court.

(2) The various statutes cited by respondents fall far short of solving the serious problems created by the First Circuit's narrow construction of section 1514A.

Unlike section 1514A, none of the statutes referred to by respondents provide any protection to

employees, such as the petitioners in the instant case, who bring to the attention of their own supervisors or other company officials information about misconduct forbidden by federal law. To the limited extent that any of those statutes provide protection for complaints to federal officials, the absence of protection for internal complaints under the First Circuit decision would have the highly undesirable consequence of forcing employees to go directly to the federal government without first giving their employers an opportunity to resolve a problem.

Respondents rely on section 1107 of Sarbanes-Oxley, 18 U.S.C. § 1513, which they describe as criminalizing retaliation against any person who provides information about a federal offense "to government officials." (Br.Opp. 31). But section 1513 applies only to providing information "to a law enforcement officer," and is used to prosecute individuals who threaten or injure informants cooperating with FBI agents, DEA agents, and the like.[1] The section 1515(a)(4) definition of "law enforcement officer" excludes employees of the SEC and other federal regulatory agencies, whose responsibilities are expressly limited to investigating and prosecuting civil actions. The SEC's Enforcement Manual stresses that

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[1] E.g., *U.S. v. Gaither*, 533 F.Supp.2d 540, 541 (W.D.Pa. 2008) (information provided to FBI agent); *U.S. v. Lopez-De LaCruz*, 431 F.Supp.2d 200, 201 (D.P.R. 2006) (information provided to DEA agent).

"[t]he SEC has authority to bring civil, not criminal actions."[2]

The monetary reward system created by the Dodd-Frank Act, on which respondents also rely, does not apply to (or provide an incentive for) individuals who provide information to agencies other than the SEC. For example, it would not cover individuals who assist the Commodities Futures Trading Corporation (which is investigating the scandal regarding the London Inter-Bank Offering Rate), the Federal Reserve Board (which was attempting to understand and respond to events at Lehman Brothers in the months before its collapse), or the Comptroller of the Currency (which oversees problems in the nation's banks).

That monetary reward system also provides no incentives to provide information even to the SEC in cases where it is unlikely the SEC will recover penalties or other monetary relief from the institution involved. Often information is important to the SEC, not because it will lead to a particular enforcement action, but because it enables the Commission to understand growing systemic problems, such as the practices that led to the 2007 financial crisis. In addition, the SEC as a practical matter is unlikely to seek monetary relief from a firm whose misconduct

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[2] Securities and Exchange Commission, Division of Enforcement, Enforcement Manual, part 5.2 (March 9, 2012).

consisted of efforts to hide its imminent collapse.[3] Thus the incentive system has little effect in cases in which the information an employee might provide concerns the financial instability of the firm at issue.

The anti-retaliation provision in section 922 of Dodd-Frank, 15 U.S.C. § 78u-6(h), is far narrower than section 1514A. Section 922 (like the Dodd-Frank incentives) does not apply to any federal agency other than the SEC; only section 1514A can protect individuals who provide information, for example, to the Commodities Futures Trading Corporation, the Federal Reserve Board, or the Comptroller of the Currency, or to the members and committees of Congress. Even with regard to the SEC, section 922 of Dodd-Frank is narrower than section 1514A. Section 922, for example, applies only to those who "provid[e] information" to the SEC; section 1514A, on the other hand, more broadly protects those who "cause information to be provided"[4] or who "otherwise assist in an investigation." Section 922 is limited, as section 1514A is not, to those who provide information "under this section."

(3) It is not the case, as respondents suggest, that the courts of appeals are in any meaningful sense "fully capable of resolving" the conflict that

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[3] The SEC does not ordinarily seek penalties against institutions which are bankrupt; doing so would merely penalize creditors.

[4] In the instant case Lawson "caused information to be provided" by asking her attorney to write to the SEC.

exists between the First Circuit and the ARB. (Br.Opp. 19). Because a circuit court decision resolving an appeal from the ARB would not be binding on the ARB in administrative proceedings involving other parties, future circuit court decisions regarding the scope of section 1514A could only deepen the conflict by disagreeing with either the ARB or the First Circuit. Respondents argue that *Spinner* "may yet be overturned on appeal" (Br.Opp. 20). But an appellate decision in the *Spinner* litigation itself would not compel the ARB to abandon its construction of section 1514A; it would merely mean that the ARB would no longer apply that interpretation to administrative cases arising in the particular circuit to which the appeal in *Spinner* had been taken. The ARB will continue to enforce *Spinner* with regard to claims arising in any circuit that has not rejected that decision, and the conflict with the First Circuit will continue until and unless *all* twelve geographical courts of appeals have addressed this issue (and have rejected *Spinner*), an eventuality unlikely ever to occur.

In light of the exceptionally detailed analyses of the issues in the four exhaustive opinions in the instant case and in *Spinner*, respondents do not contend that further judicial consideration of this dispute is likely to add significantly to this Court's understanding of the underlying textual and other issues. Respondents suggest that if this Court delays addressing the question presented, the lower courts could consider that question in "other contexts." (Br.Opp. 21). But neither respondents, petitioners, nor any lower court or administrative tribunal has

suggested that whether section 1514A applies to retaliation against employees of non-public companies would depend in any way on the context in which that question arises. This is a simple question of statutory construction to which, litigants and lower courts agree, there are only two possible answers: "yes" or "no."

Because of the critical role that section 1514A plays in federal efforts to protect the markets, the national economy, and individual investors, delay in the resolution of the question presented would entail an unacceptable risk of injury to the public. The inability of federal officials to prevent the financial crisis of 2007 derived in significant measure from a lack of information.

> [T]he Treasury Department, the Federal Reserve Board, ... the Federal Reserve Bank of New York ... and ... [o]ther agencies ... were hampered because they did not have a clear grasp of the financial system they were charged with overseeing, particularly as it had evolved in the years leading up to the crisis. This was in no small measure due to the lack of transparency in key markets.

National Commission on the Causes of the Financial and Economic Crisis in the United States, *The Financial Crisis Inquiry Report,* xxi (2011). In the wake of the First Circuit decision, employees of non-public companies could not have confidence that they would be protected by section 1514A if they were to provide needed information to federal officials. That decision's

"very existence may cause others not before the court to refrain from ... speech." *Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973). The painfully learned lesson of financial scandals and crises from Enron to the present day is that for want of timely warning to federal officials (or, in some instances, to higher company officials) a problem at a single major institution can grow to the point that it causes billions of dollars in damage and the loss of tens of thousands of jobs. Nothing that could be gained by postponing resolution by this Court of the question presented would warrant taking such a risk.

II. THE DECISION OF THE FIRST CIRCUIT IS CLEARLY INCORRECT

Respondents' defense of the First Circuit decision illustrates the flaws in that opinion. Respondents repeatedly insist that the "plain language" of section 1514A is "expressly" inapplicable to employees of non-public companies. (Br.Opp. 17, 23, 25, 27). Respondent bases that argument on

> the title of Section 806 [of Sarbanes Oxley] – "Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud" – and the caption of the whistleblower-protection provision [(subsection 1514A(a))] – "Whistleblower protection for employees of publicly traded companies...."

(Br.Opp. 6; see *id.* at 5 ("the title and caption"), 7 (same)). But respondents' argument, relying on the

title of section 806 of Sarbanes Oxley and the caption of subsection 1514A(a), ignores a critical third heading, the caption of section 1514A itself. The caption of section 1514A contains no reference or limitation to publicly traded companies; rather, it reads "Civil action to protect against retaliation in fraud cases." The caption of section 1514A clearly would encompass employees of non-public companies, and its existence is fatal to respondents' contention that the text of section 1514A expressly excludes employees of non-publicly traded companies.

Respondents insist that the title of section 806 and the caption of section 1514A(a) are meant to be a specific and exclusive description of the substance of the law, not merely "shorthand" referring to a part of that prohibition. (Br.Opp. 7). Because that title and caption refer to employees of publicly traded companies, respondents reason, employees of all other companies must be excluded. But, as we explained in the petition (and respondents do not dispute), "publicly traded" refers to companies whose stock is bought and sold on the national exchanges and whose securities are registered under section 12 of the Securities Exchange Act. (Pet. 12). Section 1514A, however, is not limited to section 12 publicly traded companies, but also applies to companies (such as mutual funds) whose securities are not traded[5] but which are required to file reports under section 15(d).

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[5] Stock in mutual funds are sold and redeemed by the Fund, but not traded on exchanges.

Thus the references to "employees of publicly traded companies" in the title of section 806 and the caption of subsection 1514A(a) cannot have been intended as an all-inclusive description of the workers protected by the law.

The First Circuit decision also fails to provide a plausible account of the significance of the inclusion of "contractor[s]" and "subcontractor[s]" in section 1514A. If, as the First Circuit held, section 1514A does not forbid contractors and subcontractors to retaliate against their own workers, the inclusion of these two categories of employers would be meaningless, because (as the ARB noted) it would rarely be possible for a contractor or subcontractor to retaliate against *someone else's* employee. Respondents attempt to solve this problem by suggesting that contractors and subcontractors were included in section 1514A so that a covered firm could not "retaliate against whistleblowers by contracting with an ax-wielding specialist (such as the character George Clooney played in 'Up in the Air')." (Br.Opp. 14) (quoting *Fleszar v. U.S. Dep't of Labor,* 598 F.3d 912, 915 (7th Cir. 2010)). But this account makes no sense. If a covered employer is itself selecting (for a retaliatory reason) the individual to be fired, section 1514A would already apply, regardless of whether the pink slip was delivered by the employer itself, by an intermediary such as Mr. Clooney's character, or by the United States Postal Service. And if (as was true in "Up in the Air") the intermediary is merely announcing a dismissal decision made by the covered

employer, without having had any personal role in that choice, that intermediary could no more be said to have "discriminate[d]" against the employee than a United States Postal Service worker who delivered a letter with the bad news.

III. THE VIEWS OF THE ARB AND THE DEPARTMENT OF LABOR ARE ENTITLED TO WEIGHT

This Court made clear in *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S.Ct. 1325, 1335 (2011) that significant weight should be given to the consistent construction of a statute by the agency responsible for its implementation. The Labor Department has long adhered to the interpretation of section 1514A spelled out in *Spinner*. That construction was adopted by the Department in its 2004 regulations (Pet.App. 143a n.7, 170a n.22), was reaffirmed in four pre-*Spinner* ARB decisions, was again set out by the Department in its appellate brief in the instant case, and most recently was elaborately explained in *Spinner*. The Department's interpretation clearly is the result of "careful consideration, not '*post hoc* rationalization[n].'" *Kasten*, 131 S.Ct. at 1335 (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 50 (1983)).

More importantly at this juncture, in their amicus briefs in the court below both the Department of Labor and the SEC expressed their emphatic belief

that adoption of the narrow construction of section 1514A that has now been embraced by the First Circuit would deter employees from alerting federal officials and even their own employers about the types of misconduct at which section 1514A is directed, thus interfering with federal efforts to protect investors, the markets, and the national economy. (Pet. 22-26). Those same agency concerns weigh heavily in favor of granting review to put to rest the problems that have been created by the First Circuit decision. If it is not sufficiently clear whether the government regards the question presented as of such pressing importance as to warrant review by this Court, the Court should invite the Solicitor General to file a brief expressing the views of the United States.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the First Circuit. In the alternative, the Court should invite the Solicitor General to file a brief expressing the views of the United States.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court U.S.
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No. 12-3

In the Supreme Court of the United States

JACKIE HOSANG LAWSON AND JONATHAN M. ZANG,
PETITIONERS

v.

FMR LLC, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an employee of a privately held contractor or subcontractor of a public company is protected from retaliation by Section 806 of the Sarbanes-Oxley Act of 2002, 18 U.S.C. 1514A.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Discussion 7
A. The First Circuit erred in holding that 18 U.S.C. 1514A is inapplicable to petitioners 8
B. The question presented does not warrant review at this time 16
Conclusion 19

TABLE OF AUTHORITIES

Cases:

Brotherhood of R.R. Trainmen v. *Baltimore & Ohio R.R.*, 331 U.S. 519 (1947) 9, 10
Carnero v. *Boston Scientific Corp.*, 433 F.3d 1 (1st Cir.), cert. denied, 548 U.S. 906 (2006) 16
Charles v. *Profit Inv. Mgmt.*, No. 10-071, 2011 WL 6981992 (ARB Dec. 16, 2011) 13
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 13
Fleszar v. *United States Dep't of Labor*, 598 F.3d 912 (7th Cir.), cert. denied, 131 S. Ct. 423 (2010) 17
Free Enterprise Fund v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) 1
Funke v. *Federal Express Corp.*, No. 09-004, 2011 WL 3307574 (ARB July 8, 2011) 13
Johnson v. *Siemens Bldg. Techs., Inc.*, No. 08-032, 2011 WL 1247202 (ARB Mar. 31, 2011) 14
SEC v. *Zandford*, 535 U.S. 813 (2002) 13
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 15
Spinner v. *David Landau & Assocs., LLC*, Nos. 10-111, 10-115, 2012 WL 1999677 (ARB May 31, 2012) 7, 8, 15

Cases—Continued: Page

United States v. *Gonzales*, 520 U.S. 1 (1997) 8
United States v. *Mead Corp.*, 533 U.S. 218 (2001) 13
Welch v. *Chao*, 536 F.3d 269 (4th Cir. 2008), cert. denied, 556 U.S. 1181 (2009) 13
Wiest v. *Lynch*, No. 11-4257, 2013 WL 1111784 (3d Cir. Mar. 19, 2013) 13

Statutes and regulations:

Administrative Procedure Act:
5 U.S.C. 706(2)(A) 3
5 U.S.C. 706(2)(E) 3
Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376:
§ 922(b), 124 Stat. 1848 2
§ 922(c), 124 Stat. 1848 2
§ 929A, 124 Stat. 1852 2
Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 ..... 1, 6, 11, 16
18 U.S.C. 1513(e) (§ 1107, 116 Stat. 810) 12
18 U.S.C. 1514A (§ 806, 116 Stat. 802) ..... *passim*
18 U.S.C. 1514A(a) 5, 8, 9, 10, 12
18 U.S.C. 1514A(a)(1) (2002) 2
18 U.S.C. 1514A(b) 13
18 U.S.C. 1514A(b)(1) 3
18 U.S.C. 1514A(b)(1)(A) 3
18 U.S.C. 1514A(b)(1)(B) 3, 4
18 U.S.C. 1514A(b)(2)(A) 3
18 U.S.C. 1514A(c) 4

Statutes and regulations—Continued: Page

Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (15 U.S.C. 78a *et seq.*):
§ 12 (15 U.S.C. 78*l*) (2006 & Supp. V 2011) 2, 8
§ 15(d) (15 U.S.C. 78*o*(d)) (2006 & Supp. V 2011) 2, 8, 10
28 U.S.C. 1292(b) 5
49 U.S.C. 42121(b) 3
49 U.S.C. 42121(b)(4)(A) 3
29 C.F.R.:
Section 1980.101 (2011) 6, 14
Section 1980.101(f) 14
Section 1980.101(g) 14
Section 1980.102(a) 14
Section 1980.110(a) 3

Miscellaneous:

69 Fed. Reg. (Aug. 24, 2004):
p. 52,104 14
pp. 52,105-52,106 14
S. Rep. No. 146, 107th Cong., 2d Sess. (2002) 11
U.S. Dep't of Labor:
Secretary's Order No. 1-2002, 67 Fed. Reg. (Oct. 17, 2002):
p. 64,272 ..... 3, 13
p. 64,273 13
Secretary's Order No. 1-2010, 75 Fed. Reg. 3924 (Jan. 25, 2010) 3
Secretary's Order No. 1-2012, 77 Fed. Reg. 3912 (Jan. 25, 2012) 3

In the Supreme Court of the United States

No. 12-3

JACKIE HOSANG LAWSON AND JONATHAN M. ZANG, PETITIONERS

v.

FMR LLC, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Congress enacted the Sarbanes-Oxley Act of 2002 to protect investors in public companies "[a]fter a series of celebrated accounting debacles." *Free Enterprise Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3147 (2010); see Pub. L. No. 107-204, 116 Stat. 745 (title). In Section 806 of the Act, Congress created a new cause of action for persons who suffer retaliation when they report fraud or violation of securities regulations to their supervisors or to the government. See

116 Stat. 802 (enacting 18 U.S.C. 1514A). That provision states:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee

when the employee provides information to a federal agency, Congress, or a supervisor regarding any conduct the employee reasonably believes violates certain federal fraud statutes or a regulation of the Securities and Exchange Commission (SEC). 18 U.S.C. 1514A(a)(1) (2002).[1] Put more simply, the statute prohibits retaliation by a public company[2]—or an officer, employee, contractor, subcontractor, or agent of a public

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[1] Following the events in this case, Congress amended Section 1514A expressly to include certain subsidiaries of public companies and nationally recognized statistical rating organizations. See Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, §§ 922(b) and (c), 929A, 124 Stat. 1848, 1852 (2010). Those changes do not apply to this case, see Pet. App. 12a n.6, and therefore all citations to Section 1514A are to the unamended text in the 2006 edition.

[2] Like the courts below, this brief uses the term "public company" to refer to a company with a class of securities registered under Section 12 of the Securities Exchange Act and those required to file reports under Section 15(d) of the Securities Exchange Act, and "publicly traded companies" to refer only to companies with securities registered under Section 12 of the Securities Exchange Act. See Pet. App. 13a.

company—against "an employee" who reports fraud or a violation of securities regulations. The question in this case is whether the phrase "an employee" includes an employee of a contractor or subcontractor of a public company, or refers only to an employee of the public company itself.

The Secretary of Labor is responsible for enforcing this whistleblower-protection provision. A person who alleges retaliation or discrimination under this provision may file a complaint with the Secretary. 18 U.S.C. 1514A(b)(1)(A). The Secretary is authorized to investigate complaints of retaliation and issue a final decision following an investigation and hearing. See 18 U.S.C. 1514A(b)(1)(A) and (2)(A); 49 U.S.C. 42121(b). The Secretary has delegated investigatory responsibility to the Assistant Secretary of Labor for Occupational Safety and Health and adjudicatory authority to the Department of Labor's Administrative Review Board (ARB). See Secretary's Order No. 1-2012, 77 Fed. Reg. 3912 (Jan. 25, 2012); Secretary's Order No. 1-2010, 75 Fed. Reg. 3924 (Jan. 25, 2010); Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); see also 29 C.F.R. 1980.110(a).

Final decisions of the ARB are reviewable in the federal courts of appeals under the Administrative Procedure Act. See 18 U.S.C. 1514A(b)(1) and (2)(A); 49 U.S.C. 42121(b)(4)(A); see also 5 U.S.C. 706(2)(A) and (E). If the ARB does not issue a final decision within 180 days of the filing of the administrative complaint, and there is no bad faith on the part of the person alleging retaliation, that person may file suit directly in federal district court. See 18 U.S.C. 1514A(b)(1)(B). An employee who makes out a claim of retaliation is "entitled to all relief necessary to make the employee whole,"

including reinstatement, back pay with interest, and fees and costs. 18 U.S.C. 1514A(c).

2. Petitioners are two former employees of respondents who allege that respondents retaliated against them for reporting fraud. Pet. App. 3a-5a, 7a. Respondents are privately held companies that provide investment advice and management services to the Fidelity mutual funds. *Id.* at 3a-4a, 7a, 13a. The Fidelity mutual funds are public companies with no employees of their own; their day-to-day operations are carried out by employees of investment advisers like respondents, under contracts approved by the mutual funds' board of trustees. *Id.* at 3a-4a, 78a-79a; see *id.* at 26a (noting that "investment companies like the Fidelity mutual funds often do not have their own employees, but only a Board of Trustees, and are often advised and managed by private entities, like [respondents]").

Petitioners each filed a whistleblower complaint with the Department of Labor. Pet. App. 5a, 7a. Lawson, a former finance director for Fidelity Brokerage, alleged that she had been constructively discharged in retaliation for reporting allegedly wrongful accounting and fee practices. *Id.* at 7a, 79a-82a. Zang, a former research analyst and portfolio manager for several Fidelity mutual funds, contended that respondents terminated his employment because he informed Fidelity management about conflicts of interests and alleged errors in SEC-required disclosures. *Id.* at 5a, 84a-86a.

3. Petitioners each filed suit in federal district court after the Department of Labor had not issued a final decision within 180 days of either complaint. Pet. App. 6a-8a, 82a-83a, 87a; see 18 U.S.C. 1514A(b)(1)(B). Respondents filed motions to dismiss both complaints on the ground that employees of contractors and subcon-

tractors of a public company are not protected by the whistleblower-protection provision. Pet. App. 8a.

The district court denied the motions to dismiss. Pet. App. 76a-133a. As relevant here, the court held that an employee of a contractor or subcontractor of a public company is protected from retaliation under 18 U.S.C. 1514A when the employee reports fraud against the public company's shareholders. Pet. App. 96a-123a. The court noted that "[t]he statute protects 'an employee,' but does not directly state at which entity the individual must be employed." *Id.* at 98a-99a. The court concluded that limiting the statute to only employees of public companies would be "an excessively forced and formalistic reading" that would be inconsistent with Congress's goal of encouraging insiders to report fraud against shareholders. *Id.* at 115a. The Court observed that Congress was particularly concerned "with failures to report instances of fraud against shareholders" by "employees of those institutions working with" public companies, such as the accountants, auditors, and lawyers who failed to report the accounting fraud that led to the collapse of Enron Corporation. *Id.* at 115a-116a.

The district court certified the question of Section 1514A(a)'s application to petitioners to the court of appeals for interlocutory review under 28 U.S.C. 1292(b). Pet. App. 9a.

4. The court of appeals reversed. Pet. App. 1a-75a. The court held that only an employee of a public company is protected by 18 U.S.C. 1514A. Pet. App. 17a. The court acknowledged that "different readings may be given" to the term "employee" in the statute, but concluded that the "more natural" reading is that "only the employees of the defined public companies are covered." *Id.* at 15a-17a. The court based that conclusion on the

statute's title and caption, both of which refer to "employees of publicly traded companies," *id.* at 19a-22a; other statutes in which Congress used specific language to regulate private companies, *id.* at 22a-33a; and general statements in congressional reports and by individual legislators about protecting "employees of publicly traded companies," *id.* at 37a-40a. The court declined to defer to the Department of Labor's interpretation of the statute on the grounds that its regulation addressing this question is procedural, rather than substantive, and because there is "no ARB holding on point." *Id.* at 46a-51a.

Judge Thompson dissented. Pet. App. 52a-75a. In her view, the court "impose[d] an unwarranted restriction on the intentionally broad language of the Sarbanes-Oxley Act" that "bar[s] a significant class of potential securities-fraud whistleblowers from any legal protection." *Id.* at 52a. Judge Thompson noted that the whistleblower-protection provision "by its terms applies" because petitioners allege that a "contractor" of a public company "discharge[d] * * * an employee," and there is "no restriction limiting the statute's application to employees of publicly held companies." *Id.* at 53a, 55a. Judge Thompson further explained that "Congress was explicit" in other portions of the Sarbanes-Oxley Act "where it intended to regulate public entities only." *Id.* at 56a-59a. Judge Thompson placed little weight on the provision's title and caption, because they "do[] not purport to apply any explicit limitations." *Id.* at 59a-60a. Finally, Judge Thompson afforded deference to the Department of Labor's view that the whistleblower-protection provision applies to employees of contractors of public companies. *Id.* at 62a-63a, 70a-73a (citing 29 C.F.R. 1980.101 (2011)).

Petitioners filed a petition for rehearing en banc, which was denied, with two judges dissenting. Pet. App. 134a-135a.

5. After the court of appeals' decision in this case, the ARB addressed the question whether 18 U.S.C. 1514A applies to employees of contractors and subcontractors in *Spinner* v. *David Landau & Associates, LLC*, Nos. 10-111, 10-115, 2012 WL 1999677, at *2 (May 31, 2012). Pet. App. 136a-199a. After an extensive analysis of the statute's text, broader statutory framework, legislative history, and purpose, the ARB concluded that the whistleblower-protection provision applies to an auditor at a privately held firm that contracted with a public company. *Id.* at 166a. The ARB specifically considered, but ultimately declined to adopt, the court of appeals' reasoning in this case. *Id.* at 144a-145a.

DISCUSSION

The court of appeals erred in holding that employees of contractors and subcontractors of public companies are not protected from retaliation by 18 U.S.C. 1514A. The statute states that a "contractor" or "subcontractor" of a public company may not retaliate against "an employee" who reports fraud. The text does not limit this protection to employees of public companies, and the legislative record supports the conclusion that Congress intended to reach employees of private contractors of public companies who report fraud against shareholders. This understanding of the statute is reflected in a regulation issued by the Department of Labor as well as in decisions of the ARB. The court of appeals' rule creates an unwarranted gap in whistleblower protection for many of the employees in the best position to discover and report corporate fraud.

However, review of the question presented would be premature at this time. There is no disagreement in the circuits on that question, the issue has arisen infrequently, and no circuit has had the opportunity to consider the ARB's recent decision in *Spinner* v. *David Landau & Associates, LLC*, Nos. 10-111, 10-115, 2012 WL 1999677 (May 31, 2012), which is entitled to *Chevron* deference. The petition for a writ of certiorari therefore should be denied.

A. The First Circuit Erred In Holding That 18 U.S.C. 1514A Is Inapplicable To Petitioners

1. a. The statutory provision at issue prohibits retaliation by any "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)), or any officer, employee, contractor, subcontractor, or agent of such company, * * * against *an employee*." 18 U.S.C. 1514A(a) (emphasis added). The statutory text identifies a broad range of entities and persons who are prohibited from engaging in retaliation—a public company or "any officer, employee, contractor, subcontractor, or agent" of such a company. See *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("any" is a term of "breadth"). The statute then defines the object of the impermissible retaliation—"an employee." By its plain terms, the statute does not limit its protection to employees of public companies. See Pet. App. 55a (Thompson, J., dissenting). Congress's use of the broad term "an employee," rather than a narrower term like "an employee of such company," evidences Congress's intent to protect from retaliation employees of each of the listed persons and entities who

report fraud, rather than only employees of the public company itself. See *id.* at 148a.

Other text in the provision reinforces the conclusion that "an employee" includes an employee of a contractor or subcontractor. Section 1514A(a) provides that the specified persons and entities may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment." 18 U.S.C. 1514A(a). As the district court noted, if the statute were limited to employees of public companies, the prohibitions on contractors and subcontractors would have little force, because it would be "difficult to think of circumstances that would * * * enable a subcontractor to discharge, demote, or suspend the employee of a public company." Pet. App. 101a-102a. It also would be difficult to apply the statutory remedies in such circumstances, because a contractor or subcontractor would not be able to reinstate an employee of a public company to his former position following a successful lawsuit. *Id.* at 150a (ARB's decision in *Spinner*). By contrast, reading the phrase "an employee" to include an employee of a contractor or subcontractor gives meaning to the prohibition against retaliation by contractors and subcontractors. See *id.* at 54a-55a (Thompson, J., dissenting).

b. The court of appeals erred in finding that the whistleblower-protection provision's title and caption were dispositive. A statute's title or caption may be a helpful aid in interpreting "some ambiguous word or phrase," but it "cannot limit the plain meaning of the text." *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528-529 (1947). That is particularly true where the title and caption simply provide "a

short-hand reference to the general subject matter involved." *Id.* at 528.

Here, both the title of this section in the relevant public law—"Protection For Employees of Publicly Traded Companies Who Provide Evidence of Fraud," § 806, 116 Stat. 802—and Section 1514A(a)'s caption—"Whistleblower Protection for Employees of Publicly Traded Companies"—provide such a short-hand reference. The title and caption plainly do not define the whole scope of the whistleblower-protection provision. For example, although the title and caption refer to "publicly traded companies," the provision by its text applies both to those companies and to companies that are not publicly traded but are required to file reports under Section 15(d) of the Securities Exchange Act. See 18 U.S.C. 1514A(a). As the district court explained, it is "reasonable" to use the quoted caption and title as a short-hand description of a provision that covers both employees of public companies and "employees of their related entities" because "all protected employees would have some connection to public companies, even if indirectly," and because a title and caption that included all of the "complicated clauses and concepts" in the statute's text would be cumbersome. Pet. App. 107a-108a. That is confirmed by the title of 18 U.S.C. 1514A as a whole—"Civil action to protect against retaliation in fraud cases"—which plainly does not limit the protection against retaliation to employees of public companies. See Pet. Reply 10.

c. The legislative record also supports the conclusion that Congress intended to protect employees of contractors and subcontractors. One of Congress's key goals was to restore investor confidence in the Nation's financial markets in the wake of various financial accounting

scandals. See S. Rep. No. 146, 107th Cong., 2d Sess. 2 (2002) (*Senate Report*). "[N]othing in the legislative history" shows a congressional intent to "limit whistleblower protection to employees of public companies"; instead, the legislative record "refers positively to extending whistleblower protection in order to encourage the reporting of securities fraud." Pet. App. 60a-61a (Thompson, J., dissenting).

Congress enacted the whistleblower-protection provision "in the wake of the continuing Enron Corporation * * * debacle," in which, "[w]ith the assistance of [Arthur] Andersen and its other auditors, Enron apparently successfully deceived the investing public and reaped millions." *Senate Report* 2-3; *id.* at 2 (noting that Enron perpetuated its fraud "with the approval or advice of its accountants, auditors and lawyers"). The *Senate Report* specifically noted that "employees at both Enron and Andersen attempted to report or 'blow the whistle' on fraud, but they were discouraged at nearly every turn." *Id.* at 5. The *Senate Report* recounted specific instances of retaliation against employees of both Enron and Arthur Anderson, including when an "Andersen partner was apparently removed from the Enron account when he expressed reservations about the firm's financial practices." *Ibid.* This discussion reinforces the conclusion that in the specific provision of the Sarbanes-Oxley Act affording protection to whistleblowers, Congress intended to protect both employees of public companies and employees of their contractors from retaliation. Construing the whistleblower-protection provision to protect employees of contractors of public companies addresses this congressional concern, whereas construing the statute to protect only employees of public companies would leave unprotected "outside accountants,

auditors, and lawyers, who are most likely to uncover and comprehend evidence of potential wrongdoing." Pet. App. 158a (ARB decision in *Spinner*).

The resulting gap in protection would be especially troubling with respect to mutual fund companies. "[T]he Fidelity funds have no employees of their own," and (as is typical in the industry) they depend on contractors and subcontractors like respondents for their day-to-day operations. Pet. App. 4a, 26a-27a. Yet under respondents' view, those individuals would have no protection whatsoever under 18 U.S.C. 1514A. See Pet. App. 121a ("If [18 U.S.C. 1514A] only protected employees of public companies, then any reporting of fraud involving a mutual fund's shareholders would go unprotected, for the very simple reason that no 'employee' exists for this particular type of public company."). The frustration of congressional purpose resulting from the court of appeals' interpretation therefore is particularly acute in the mutual fund industry.[3]

2. To the extent 18 U.S.C. 1514A(a) is ambiguous, the Department of Labor has provided an interpretation of it that is entitled to deference. Congress has charged the Secretary of Labor with enforcing the

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[3] Respondents contend (Br. in Opp. 28-32) that exempting employees of contractors and subcontractors from 18 U.S.C. 1514A is unproblematic because other statutes protect them from retaliation. But those statutes do not fill the void left by the court of appeals' erroneous construction of the whistleblower-protection provision. Most of the cited provisions do not remedy retaliation. For example, Section 1107 of Sarbanes-Oxley, 18 U.S.C. 1513(e), which respondents characterize as criminalizing retaliation, is available to prosecute those who engage in criminal obstruction of justice, but provides no remedies to employees who are retaliated against for reporting fraud or violations of SEC rules to their employers or the SEC. See Pet. Reply 3-6.

whistleblower-protection provision, both through investigation and through formal adjudication, see 18 U.S.C. 1514A(b), and the Secretary has delegated adjudicatory authority to the ARB, see 67 Fed. Reg. at 64,272, 64,273. Agency views expressed through formal adjudication by the ARB are entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). See, *e.g.*, *Wiest* v. *Lynch*, No. 11-4257, 2013 WL 1111784, at *8 (3d Cir. Mar. 19, 2013); *Welch* v. *Chao*, 536 F.3d 269, 276 n.2 (4th Cir. 2008), cert. denied, 556 U.S. 1181 (2009). See also *SEC* v. *Zandford*, 535 U.S. 813, 819-820 (2002) (an interpretation of ambiguous statutory text, rendered "in the context of formal adjudication, is entitled to deference if it is reasonable"); *United States* v. *Mead Corp.*, 533 U.S. 218, 229-230 (2001) (recognizing that "express congressional authorizations to engage in the process of * * * adjudication that produces * * * rulings for which deference is claimed" is "a very good indicator of delegation meriting *Chevron* treatment"). Accordingly, the ARB's resolution of any ambiguity in the phrase "an employee" is "controlling" as long as it is reasonable.

Even before the court of appeals' decision in this case, the ARB had consistently viewed the whistleblower-protection provision as not limited to employees of public companies. See Pet. App. 143a-144a.[4] The ARB based that view in part on a Depart-

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[4] See, *e.g.*, *Charles* v. *Profit Inv. Mgmt.*, No. 10-071, 2011 WL 6981992, at *4-*5 (ARB Dec. 16, 2011) (rejecting the conclusion that an employee of a private company is not covered by the whistleblower-protection provision because that provision "covers only employees of publicly traded companies"); *Funke* v. *Federal Express Corp.*, No. 09-004, 2011 WL 3307574, at *5-*6 (ARB July 8, 2011) (holding that the statute covers disclosure of third-party fraud and noting that "Congress understood that to effectively address corporate fraud, the law needed to extend to entities related to public

ment of Labor regulation that applies the whistleblower-protection provision to employees of contractors and subcontractors. See 29 C.F.R. 1980.101 (2011) (defining "employee" as including "an individual presently or formerly working for a company or company representative" and defining a "company representative" as including "any officer, employee, contractor, subcontractor, or agent of a [public] company"), 1980.102(a) (prohibition on retaliation against "any employee"); 69 Fed. Reg. 52,104, 52,105-52,106 (Aug. 24, 2004) (stating in preamble that "[t]he statute * * * protects the employees of publicly traded companies as well as the employees of contractors, subcontractors, and agents of those publicly traded companies").[5] Although the ARB's prior decisions did not expressly hold that an employee of a contractor or subcontractor of a public company is covered by the whistleblower-protection provision, and the Secretary had deemed the regulation "procedural," see Pet. App. 45a n.21, the court of appeals erred in

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companies—accounting firms, law firms, and the like—which may themselves be involved in performing or disguising fraudulent activity"); *Johnson* v. *Siemens Bldg. Techs., Inc.*, No. 08-032, 2011 WL 1247202, at *12 (ARB Mar. 31, 2011) (holding that an employee of a subsidiary of a public company is covered by the statute and explaining that the statute reaches "more than employees of publicly traded companies").

[5] The district court (Pet. App. 116a-117a) and the court of appeals (*id.* at 47a-48a) both referred to the 2011 version of the regulation. Although the regulation has been amended and the terminology has changed, the regulation continues to prohibit retaliation against an employee of a contractor or subcontractor. See 29 C.F.R. 1980.101(f) and (g) (current version) (defining "employee" as including "an individual presently or formerly working for a covered person," and defining a "covered person" as including "any officer, employee, contractor, subcontractor, or agent of [a public] company"), 1980.102(a) (prohibition on retaliation against "any employee").

giving these statements of the expert agency's views no weight at all. At a minimum, the Department's consistent and reasonable position should have been afforded deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

In any event, the ARB has recently and comprehensively addressed the question presented, and its view that the whistleblower-protection provision applies to employees of contractors and subcontractors is entitled to *Chevron* deference. See Pet. App. 136a-199a (*Spinner*, *supra*); pp. 12-13, *supra*. In *Spinner*, the ARB explained that although there is "some ambiguity" in the statute's text, the better view is that "an employee" is not limited to an employee of a public company, because "the statute does not restrict its application to [such] employees" by its plain terms and the prohibition on retaliation by contractors and subcontractors would have little meaning if their employees were not covered. Pet. App. 148a, 150a-151a. The ARB considered the provision's title and caption, but declined to find them "controlling," because "[n]either * * * describes the full scope or complexity of [18 U.S.C. 1514A's] provisions." Pet. App. 151a-152a.

The ARB found "[n]othing" in the legislative history showing that "Congress intended to limit whistleblower protection * * * to only employees of publicly traded companies," and it observed that "denying coverage to employees of contractors, subcontractors, or agents runs counter to [Congress's] goals." Pet. App. 154a. The ARB also noted that the provision at issue was patterned on other whistleblower-protection statutes and those statutes cover employees of contractors. *Id.* at 161a-165a. Finally, the ARB found support in the "decades of Department of Labor precedent extending

coverage under analogous whistleblower statutes to employees of contractors." *Id.* at 143a n.7.

The ARB's decision in *Spinner* is entitled to deference. As the court of appeals recognized, "different readings may be given to the term 'employee'" in 18 U.S.C. 1514A. Pet. App. 15a. As explained above and in the ARB's decision in *Spinner*, it is reasonable to read the broad and inclusive term "an employee" to include employees of contractors and subcontractors. The court of appeals therefore erred in excluding those employees from the statute's reach.

B. The Question Presented Does Not Warrant Review At This Time

The question whether employees of contractors and subcontractors of public companies are covered by the whistleblower-protection provision in 18 U.S.C. 1514A is an important one. The court of appeals' decision creates a gap in whistleblower protection under the Sarbanes-Oxley Act, contrary to Congress's purpose of protecting insiders from retaliation when they report fraud or violations of securities regulations. Nonetheless, further review of the question presented is unwarranted at this time.

1. The court of appeals' decision does not conflict with the decision of any other court of appeals on the question presented. As the First Circuit recognized in this case (Pet. App. 14a), no other court of appeals has addressed whether employees of contractors and subcontractors of public companies are protected by 18 U.S.C. 1514A.[6] The lack of a circuit conflict and the

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[6] In *Carnero* v. *Boston Scientific Corp.*, 433 F.3d 1 (1st Cir.), cert. denied, 548 U.S. 906 (2006), the court of appeals considered a retaliation claim by an employee of a private subsidiary of a public

infrequency with which federal courts have faced this question, cf. Br. in Opp. 12-14, counsel against this Court's review at this time.

Although the question presented is significant, it would be premature for this Court to grant review before other courts have the opportunity to consider the issue. Despite the court of appeals' erroneous decision, whistleblowers who work for privately held accounting firms, law firms, and investment advisers to public companies will still be able to file complaints with the Secretary, who will still adjudicate those complaints to determine whether unlawful retaliation occurred, and the ARB will continue to apply its decision in *Spinner* to claims outside of the First Circuit. See Pet. App. 145a n.10. In all circuits but one, whether an employee of a contractor or subcontractor of a public company is covered by the whistleblower-protection provision is an open question. This Court would benefit substantially by permitting the other courts of appeals to consider the question presented before the Court intervenes.

2. Further percolation in the circuits is especially appropriate because no circuit—including the First Circuit—has considered the ARB's recent decision in

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company. *Id.* at 2. But the issue before the court was whether the whistleblower-protection provision had extraterritorial effect; the court did not address whether the provision applies to employees of contractors and subcontractors of public companies. *Id.* at 5-6.

In *Fleszar* v. *United States Department of Labor*, 598 F.3d 912 (7th Cir.), cert. denied, 131 S. Ct. 423 (2010), the court of appeals affirmed the ARB's dismissal of a case against the American Medical Association because that organization is not a public company. *Id.* at 913. The court suggested in dicta that employees of contractors of public companies might not be protected, but it did not need to resolve that question because there was no claim of retaliation against an employee of a contractor in the case. *Id.* at 915.

Spinner. Although prior ARB decisions stated the agency's longstanding view that employees of contractors and subcontractors are protected by 18 U.S.C. 1514A, they did not expressly address the question presented. See Pet. App. 105a (district court's statement that "[t]he ARB of DOL has yet to provide the ALJs with definitive clarification on these matters"). But in *Spinner*, the ARB directly and comprehensively addressed that legal question, and it concluded that the better reading of the statute is that "an employee" includes an employee of a contractor or subcontractor. *Id.* at 146a-166a. The ARB also specifically considered the reasoning of the First Circuit in this case, and it explained why it declined to adopt that reasoning. *Id.* at 144a-146a. Both the First Circuit and the other courts of appeals should be permitted to consider whether the ARB's decision in *Spinner* is entitled to *Chevron* deference.[7] For that reason as well, further review is unwarranted at this time.

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[7] The First Circuit may decline to defer to the agency's analysis in *Spinner*, because the court stated in its opinion that it found the statute "unambiguous." Pet. App. 31a n.15; see *id.* at 22a, 46a, 51a. But at the same time, the court acknowledged that "different readings may be given to the term 'employee,'" *id.* at 15a, and stated that its reading was "the more natural reading," *id.* at 16a, as opposed to the only possible reading. *Spinner* simply was not before the court of appeals, and thus it is uncertain how the court of appeals would address the government's claim for deference to that decision in light of the decision's analysis, which demonstrated at the very least that the term "an employee" is ambiguous and that the ARB's interpretation is reasonable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2013

AMICUS CURIAE BRIEF

No. 12-3

In the Supreme Court of the United States

JACKIE HOSANG LAWSON AND JONATHAN M. ZANG,
PETITIONERS

v.

FMR, LLC, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether an employee of a privately held contractor or subcontractor of a public company is protected from retaliation by 18 U.S.C. 1514A.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 6
Argument:
Employees of contractors and subcontractors of public companies are protected from retaliation by 18 U.S.C. 1514A 9
A. The Administrative Review Board's decision in *Spinner* is entitled to *Chevron* deference 9
B. Section 1514A's plain text encompasses employees of contractors and subcontractors of public companies 11
C. Interpreting Section 1514A to cover employees of contractors and subcontractors furthers the statutory purposes 19
D. The court of appeals' reading of Section 1514A leaves significant and unwarranted gaps in protection against retaliation 24
E. Respondents' arguments opposing deference lack merit 31
Conclusion 34
Appendix — Statutory and regulatory provisions 1a

TABLE OF AUTHORITIES

Cases:

AT&T Corp. v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999) 10
Brotherhood of R.R. Trainmen v. *Baltimore & Ohio R.R.*, 331 U.S. 519 (1947) 18, 19
Charles v. *Profit Inv. Mgmt.*, No. 10-071, 2011 WL 6981992 (ARB Dec. 16, 2011) 31
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 7, 9
City of Arlington v. *FCC*, 133 S. Ct. 1863 (2013) 9

Cases—Continued: Page

Evans v. *Miami Valley Hosp.*, No. 07-118, 2009 WL 1898238 (ARB June 30, 2009) 17
Free Enter. Fund v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) 2
Funke v. *Federal Express Corp.*, No. 09-004, 2011 WL 3307574 (ARB July 8, 2011) 31
Johnson v. *Siemens Bldg. Techs., Inc.*, No. 08-032, 2011 WL 1247202 (ARB Mar. 31, 2011) 32
Jones v. *Harris Assocs. L.P.*, 559 U.S. 335 (2010) 26
Kaiser Aluminum & Chem. Corp. v. *Bonjorno*, 494 U.S. 827 (1990) 11
Kalkunte v. *DVI Fin. Servs.*, Nos. 05-139 & 05-140, 2009 WL 564738 (ARB Feb. 27, 2009) 16
Kasten v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011) 19, 25
Lockheed Martin Corp. v. *Administrative Review Bd.*, 717 F.3d 1121 (10th Cir. 2013) 10
Pacific Operators Offshore, LLP v. *Valladolid*, 132 S. Ct. 680 (2012) 13
Pension Benefit Guaranty Corp. v. *LTV Corp.*, 496 U.S. 633 (1990) 27
SEC v. *Zandford*, 535 U.S. 813 (2002) 10
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 33
Smiley v. *Citibank (S.D.), N.A.*, 517 U.S. 735 (1996) 10
Spinner v. *David Landau & Assocs., LLC*, No. 10-111, 2012 WL 1999677 (ARB May 31, 2012) ..... *passim*
United States v. *Gonzales*, 520 U.S. 1 (1997) 13
United States v. *Hayes*, 555 U.S. 415 (2009) 25
United States v. *Mead Corp.*, 533 U.S. 218 (2001) 10, 33
Welch v. *Chao*, 536 F.3d 269 (4th Cir. 2008), cert. denied, 556 U.S. 1181 (2009) 11
Wiest v. *Lynch*, 710 F.3d 121 (3d Cir. 2013) 10

Statutes and regulations: Page

Administrative Procedure Act:
5 U.S.C. 706(2)(A) 4
5 U.S.C. 706(2)(E) 4
Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 29
§ 922(a), 124 Stat. 1841 ..... 29, 30
§ 922(b), 124 Stat. 1848 30
§ 929A, 124 Stat. 1852 30
Investment Advisers Act of 1940, ch, 686, tit. II, 54 Stat. 847 (15 U.S.C. 80b-1 *et seq*). 26
Investment Company Act of 1940, ch. 686, tit. I, 54 Stat. 789 (15 U.S.C. 80a-1 *et seq.*) 26
Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 ..... *passim*
§ 2(a)(9), 116 Stat. 747 23
§ 2(a)(11), 116 Stat. 748 23
§ 2(a)(12), 116 Stat. 748 23
Tit. I, 116 Stat. 750:
§§ 101-107, 116 Stat. 750 23
Tit. II, 116 Stat. 771:
§§ 201-206, 116 Stat. 771 24
Tit. III, 116 Stat. 775:
§ 307, 116 Stat. 784 ..... 24, 28
Tit. V, 116 Stat. 791:
§ 501, 116 Stat. 791 24
Tit. VI, 116 Stat. 793:
§ 602, 116 Stat. 794 24
Tit. VIII, 116 Stat. 800:
§ 802, 116 Stat. 800 24
§ 806, 116 Stat. 802 ..... 3, 18, 24

Statutes and regulations—Continued: Page

§ 807, 116 Stat. 804 24
Tit. IX, 116 Stat. 804:
§§ 901-905, 116 Stat. 804 24
Tit XI, 116 Stat. 807:
§ 1107, 116 Stat. 810 24
18 U.S.C. 1513 (2006 & Supp. V 2011) 29
18 U.S.C. 1513(e) (Supp. V 2011) 29
18 U.S.C. 1514A ..... *passim*
18 U.S.C. 1514A(a) ..... *passim*
18 U.S.C. 1514A(a)(1) 18
18 U.S.C. 1514A(a)(1)(c) 14
18 U.S.C. 1514A(a)(1)-(2) 23
18 U.S.C. 1514A(a)(2) 14
18 U.S.C. 1514A(b) 1, 10
18 U.S.C. 1514A(b)(1) 4
18 U.S.C. 1514A(b)(1)(A) 3, 33
18 U.S.C. 1514A(b)(1)(B) 4, 33
18 U.S.C. 1514A(b)(2) 3, 14
18 U.S.C. 1514A(b)(2)(A) 3, 4
18 U.S.C. 1514A(c) 4
18 U.S.C. 1514A(c)(2) 7
Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (15 U.S.C. 78a *et seq.*):
§ 12 (15 U.S.C. 78*l* (2006 & Supp. V 2011)) 3, 11
§ 15(d) (15 U.S.C. 78*o*(d) (2006 & Supp. V 2011)) 3, 11
Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (49 U.S.C. 42121) 16
49 U.S.C. 42121(a) 17
49 U.S.C. 42121(b) 3, 10
49 U.S.C. 42121(b)(2)(A) 3, 4

Statutes and regulations—Continued: Page

49 U.S.C. 42121(b)(2)(B)(ii) 14
49 U.S.C. 42121(b)(2)(B)(iv) 14
49 U.S.C. 42121(b)(4)(A) 4
6 U.S.C. 1142(c)(7) 33
12 U.S.C. 5567(c)(4)(D)(i) (Supp. V 2011) 33
15 U.S.C. 2087(b)(4) (Supp. V 2011) 33
15 U.S.C. 7211(c)(1) (Supp. V 2011) 29
15 U.S.C. 7245 ..... 24, 28
21 U.S.C. 399d(b)(4) (Supp. V 2011) 33
42 U.S.C. 5851(b)(4) 33
49 U.S.C. 20109(d)(3) (Supp. V 2011) 33
49 U.S.C. 31105(c) (Supp. V 2011) 33
49 U.S.C.A. 30171(b)(3)(E) 33
17 C.F.R. Pt. 205 ..... 24, 28
29 C.F.R.:
Section 1980.101 32
Section 1980.101(f) 32
Section 1980.101(g) 32
Section 1980.102(a) 32
Section 1980.103 3
Section 1980.104 3
Section 1980.105 3
Section 1980.105(c) 3
Section 1980.106 4
Section 1980.107 4
Section 1980.109 4
Section 1980.110 4
Section 1980.110(a) 10

Miscellaneous: Page

148 Cong. Rec. 2947 (2002) 22
67 Fed. Reg. (Apr. 1, 2002):
p. 15,454 17
p. 15,458 17
69 Fed. Reg. (Aug. 24, 2004):
p. 52,104 16
p. 52,105 ..... 16, 32
pp. 52,105-52,106 32
76 Fed. Reg. (Nov. 3, 2011):
p. 68,084 ..... 32, 33
p. 68,091 33
77 Fed. Reg.:
p. 3912 (Jan. 25, 2012) 3, 34
p. 69,378 (Nov. 16, 2012) 4, 10
6 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* (2009) 27
Investment Co. Inst., *2013 Investment Company Fact Book* (53d ed.), http://www.icifactbook.org/pdf/2013_factbook.pdf 25, 26
S. Rep. No. 146, 107th Cong., 2d Sess. (2002) ..... *passim*
S. Rep. No. 176, 111th Cong., 2d Sess. (2010) 29, 31
Securities and Exchange Commission:
Annual Report on Nationally Recognized Statistical Rating Organizations (Mar. 2012), http://www.sec.gov/divisions/marketreg/ratingagency/nrsroannrep0312.pdf 30
Closed-end Fund, http://investor.gov/glossary/glossary_terms/closed-end-fund 26
Credit Rating Agencies and Nationally Recognized Statistical Rating Organizations, http://www.sec.gov/answers/nrsro.htm 30

Miscellaneous—Continued: Page

General Information on the Regulation of Investment Advisers, http://www.sec.gov/divisions/investment/iaregulation/memoia.htm 27

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v.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the question whether an employee of a contractor or subcontractor of a public company is protected from retaliation by 18 U.S.C. 1514A. The Department of Labor is charged with interpreting and enforcing this anti-retaliation provision through administrative adjudication, see 18 U.S.C. 1514A(b), and its Administrative Review Board has issued a precedential decision addressing the question presented, see *Spinner* v. *David Landau & Assocs., LLC*, Nos. 10-111 & 10-115, 2012 WL 1999677, at *2 (May 31, 2012) (Pet. App. 136a-199a). The Securities and Exchange Commission (SEC) is responsible for enforcing the federal securities laws and has an interest in ensuring that persons report potential violations of those laws. Accordingly, the United States has a substantial interest in the disposi-

tion of this case. At the invitation of this Court, the United States filed an amicus brief at the petition stage of this case.

STATEMENT

1. Congress enacted the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (Sarbanes-Oxley Act or Act), to protect investors in public companies and restore trust in the financial markets in the aftermath of the collapse of Enron Corporation. *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3147 (2010); S. Rep. No. 146, 107th Cong., 2d Sess. 2-5 (2002) (Senate Report). One particular issue Congress addressed was the lack of legal protection for persons who report corporate fraud.

To address that concern, Congress enacted 18 U.S.C. 1514A. As applicable to the events in this case, Section 1514A provides:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee

in providing information to a federal agency, Congress, or a supervisor regarding any conduct the employee reasonably believes violates certain federal fraud statutes or an SEC rule or regulation. 18 U.S.C. 1514A(a);

see Sarbanes-Oxley Act § 806, 116 Stat. 802 (enacting Section 1514A).[1]

Put more simply, the statute prohibits retaliation by a public company[2]—or an officer, employee, contractor, subcontractor, or agent of a public company—against "an employee" who reports fraud or a violation of securities regulations. The question in this case is whether "an employee" includes an employee of a contractor or subcontractor of a public company, or refers only to an employee of the public company itself.

2. Congress has granted the Secretary of Labor the authority to enforce Section 1514A through administrative adjudication. See 18 U.S.C. 1514A(b)(1)(A) and (2)(A) (incorporating 49 U.S.C. 42121(b)). A person who alleges retaliation because he or she reported fraud or violation of SEC rules may file a complaint with the Secretary. 18 U.S.C. 1514A(b)(1)(A); 29 C.F.R. 1980.103. The Occupational Safety and Health Administration (OSHA) then undertakes an investigation, makes findings, and enters an initial order. 49 U.S.C. 42121(b)(2)(A) (made applicable by 18 U.S.C. 1514A(b)(2)); 29 C.F.R. 1980.104, .105; see 77 Fed. Reg. 3912 (Jan. 25, 2012). If no party objects to that order, it becomes the agency's final decision. 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1980.105(c). If there is an

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[1] Following the events in this case, Congress amended Section 1514A to add other entities as covered employers. See pp. 30-31, *infra*. Unless otherwise noted, all citations to Section 1514A are to the unamended text in the 2006 edition of the United States Code.

[2] This brief uses the term "public company" to refer to a company with a class of securities registered under Section 12 of the Securities Exchange Act and those required to file reports under Section 15(d) of the Securities Exchange Act, and "publicly traded company" to refer only to a company with securities registered under Section 12 of the Securities Exchange Act. See Pet. App. 13a.

objection, an administrative law judge (ALJ) holds a hearing and issues a decision. 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1980.106, .107, .109. The ALJ's decision may be appealed to the agency's Administrative Review Board (ARB). See 29 C.F.R. 1980.110; see 77 Fed. Reg. 69,378 (Nov. 16, 2012).

Final decisions of the ARB are reviewable in the federal courts of appeals under the Administrative Procedure Act. See 18 U.S.C. 1514A(b)(1) and (2)(A); 49 U.S.C. 42121(b)(4)(A); see also 5 U.S.C. 706(2)(A) and (E). If the ARB does not issue a final decision within 180 days of the filing of the administrative complaint, and the delay is not due to the bad faith on the part of the complainant, that person may file suit in federal district court. See 18 U.S.C. 1514A(b)(1)(B). An employee who makes out a claim of retaliation is "entitled to all relief necessary to make the employee whole," including reinstatement, back pay with interest, and fees and costs. 18 U.S.C. 1514A(c).

3. Petitioners are two former employees of respondents who allege that respondents retaliated against them for reporting fraud affecting Fidelity mutual funds. Pet. App. 3a-5a, 7a. Respondents are privately held companies that provide investment advice and management services to the Fidelity mutual funds. *Id.* at 3a-4a, 7a, 13a. The Fidelity mutual funds are public companies with no employees of their own; their day-to-day operations are carried out by employees of investment advisers like respondents, under contracts approved by the mutual funds' board of trustees. *Id.* at 3a-4a, 26a, 78a-79a.

Petitioners each filed a whistleblower complaint with the Department of Labor. Pet. App. 5a, 7a. Lawson, a former finance director for Fidelity Brokerage, alleged

that she had been constructively discharged in retaliation for reporting allegedly wrongful accounting and fee practices for certain Fidelity mutual funds. *Id.* at 7a, 79a-82a. Zang, a former research analyst and portfolio manager for several Fidelity mutual funds, contended that his employment was terminated because he informed his supervisors about conflicts of interests and alleged errors in a draft SEC-required disclosure. *Id.* at 5a, 84a-86a.

4. Petitioners filed suit in federal district court after the Department of Labor had not issued a final decision within 180 days of either complaint. Pet. App. 6a-8a, 82a-83a, 87a. Respondents sought to dismiss both complaints on the ground that employees of contractors and subcontractors of public companies are not protected by Section 1514A. *Id.* at 8a.

The district court denied the motions to dismiss, holding that an employee of a contractor or subcontractor of a public company is protected from retaliation under 18 U.S.C. 1514A when he or she reports fraud against shareholders. Pet. App. 96a-123a. The court explained that limiting protection to only employees of the public company itself would be "an excessively forced and formalistic reading" of the statute that is not mandated by its text and would undermine its purpose of encouraging insiders to report corporate fraud. *Id.* at 98a-99a, 115a-116a.

5. a. The court of appeals reversed. Pet. App. 1a-75a. The court concluded that the "more natural" reading of Section 1514A is that "only the employees of the defined public companies are covered." *Id.* at 15a-17a. The court based that conclusion on the section's heading, which refers to "employees of publicly traded companies," *id.* at 19a-22a; on other statutes in which Con-

gress used what the court regarded as more specific language to regulate private companies, *id.* at 22a-33a; and on general statements in a congressional report and by individual legislators about protecting "employees of publicly traded companies," *id.* at 37a-40a. The court declined to defer to the position of the Department of Labor because the regulations embodying that position are procedural, because the court believed Section 1514A to be unambiguous, and because there was "no ARB holding on point." *Id.* at 46a-51a.

b. Judge Thompson dissented, explaining that the majority's view "impose[s] an unwarranted restriction on the intentionally broad language of" Section 1514A and "bar[s] a significant class of potential securities-fraud whistleblowers from any legal protection." Pet. App. 52a.

6. After the court of appeals' decision in this case, the ARB issued its precedential decision in *Spinner* v. *David Landau & Associates, LLC*, *supra*. In *Spinner*, the ARB conducted an extensive analysis of the text, statutory framework, legislative history, and statutory purposes, and concluded that Section 1514A applies to an employee of a privately held firm that contracts with a public company. Pet. App. 145a-146a, 166a.

SUMMARY OF ARGUMENT

Employees of contractors and subcontractors of public companies are protected from retaliation under 18 U.S.C. 1514A when they report fraud or violation of SEC rules.

A. Congress has charged the Secretary of Labor with enforcing Section 1514A through administrative adjudication. The Department of Labor's Administrative Review Board (ARB) has concluded that Section 1514A protects employees of contractors and subcon-

tractors of public companies from retaliation. See *Spinner* v. *David Landau & Assocs., LLC*, Nos. 10-111 & 10-115, 2012 WL 1999677, at *2 (May 31, 2012) (Pet. App. 136a-199a). The ARB's decision is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), so long as it is a reasonable reading of the statute. The ARB's conclusion that Section 1514A reaches employees of contractors and subcontractors is not only reasonable but correct.

B. Section 1514A's text encompasses employees of contractors and subcontractors of public companies. It provides that no public company "or any officer, employee, contractor, subcontractor, or agent of such company" may retaliate against "an employee." 18 U.S.C. 1514A(a). In context, it is clear that an "employee" is a person employed by one of the listed employers to which the prohibition on retaliation applies. There is no limiting language that confines Section 1514A to an employee of a public company.

Further, Section 1514A provides that a listed entity or individual may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment," 18 U.S.C. 1514A(a), and that a successful complainant is entitled to "reinstatement with the same seniority status" and "back pay," 18 U.S.C. 1514A(c)(2). A contractor or subcontractor typically would not have the authority to take those actions with respect to an employee of a public company.

The court of appeals limited Section 1514A's reach based on the statute's headings, but they are merely short-hand descriptions of the statute and cannot override the statute's text.

C. Interpreting Section 1514A to protect employees of contractors and subcontractors of public companies is necessary to further the statutory purposes. Congress enacted the Sarbanes-Oxley Act in the wake of the collapse of Enron Corporation. One particular concern was that contractors and subcontractors, such as Arthur Andersen, were active participants in Enron's fraud and its cover-up. When employees of those contractors attempted to report fraud, they were retaliated against.

Congress enacted Section 1514A so that these insiders would be willing to report fraud and violation of SEC rules. For the statute's protection to be effective, it must apply not only to employees of public companies, but also to contractor and subcontractor employees. That approach is consistent with the Sarbanes-Oxley Act generally; the Act contains numerous provisions that regulate accountants, auditors, and lawyers who work with public companies.

D. The court of appeals' rule creates significant and unwarranted gaps in whistleblower protection for many of the employees in the best position to discover and report corporate fraud. The employees of contractors that Congress clearly intended to reach—employees of Arthur Andersen—would not be covered. Mutual funds also would not be covered by Section 1514A, because they typically have no employees of their own and rely entirely on investment advisers. Lawyers, too, would be in a precarious position, because another part of the Sarbanes-Oxley Act requires them to report violations of securities laws internally, yet they would have no protection against retaliation under Section 1514A for making those reports.

E. Respondents' arguments against deference lack merit. Even before the decision in *Spinner*, the ARB

had not limited Section 1514A to employees of public companies, and the agency had stated this understanding in its procedural regulations. Congress has charged the Department of Labor with enforcing more than two dozen anti-retaliation statutes, recognizing the agency's substantial expertise. *Chevron* deference is appropriate here.

ARGUMENT

EMPLOYEES OF CONTRACTORS AND SUBCONTRACTORS OF PUBLIC COMPANIES ARE PROTECTED FROM RETALIATION BY 18 U.S.C. 1514A

The Department of Labor, through the Administrative Review Board, has issued a precedential decision in *Spinner* v. *David Landau & Associates, LLC*, *supra*, holding that employees of a contractor or subcontractor of a public company are protected by Section 1514A. That interpretation is entitled to *Chevron* deference. It is not only a permissible interpretation of the statute, but it is the better one.

A. The Administrative Review Board's Decision In *Spinner* Is Entitled To *Chevron* Deference

1. Under the rule of agency deference set out in *Chevron U.S.A. Inc.* v. *NRDC*, *supra*, "[w]hen a court reviews an agency's construction of the statute which it administers," it asks "whether Congress has directly spoken to the precise question at issue." *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1868 (2013) (quoting *Chevron*, 467 U.S. at 842-843). If Congress has not, then the "agency's answer" is controlling so long as it is "based on a permissible construction of the statute." *Ibid.*

This rule of deference is based on the principle that when Congress has "left ambiguity in a statute meant for implementation by an agency," it "understood that

the ambiguity would be resolved, first and foremost, by the agency" and "desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 740-741 (1996). In light of this longstanding rule, "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999).

2. The Secretary of Labor is charged with enforcing Section 1514A through administrative adjudication. Congress granted the Secretary authority to investigate and adjudicate whistleblower complaints, which necessarily includes the authority to interpret the statute in the course of those activities. 18 U.S.C. 1514A(b) (incorporating procedures in 49 U.S.C. 42121(b)); see, *e.g.*, *SEC* v. *Zandford*, 535 U.S. 813, 819-210 (2002) (agency's authority to administer statute through adjudication includes authority to interpret statute). The Secretary has delegated the authority to issue final agency decisions on Section 1514A claims to the ARB. See 77 Fed. Reg. at 69,378 (Nov. 16, 2012); see also 29 C.F.R. 1980.110(a).

The ARB's interpretation of ambiguous statutory text, rendered "in the context of formal adjudication," is "entitled to deference if it is reasonable." *Zandford*, 535 U.S. at 819-820; see *United States* v. *Mead Corp.*, 533 U.S. 218, 229-230 & n.12 (2001). The courts of appeals have routinely applied the *Chevron* framework and accorded deference to the ARB's interpretations of Section 1514A. See, *e.g.*, *Lockheed Martin Corp.* v. *Administrative Review Bd.*, 717 F.3d 1121, 1131 (10th Cir. 2013); *Wiest* v. *Lynch*, 710 F.3d 121, 131 (3d Cir. 2013);

Welch v. *Chao*, 536 F.3d 269, 276 & n.2 (4th Cir. 2008), cert. denied, 556 U.S. 1181 (2009).

3. The ARB in *Spinner* set out its considered position on the question presented in this case, holding that employees of contractors and subcontractors of public companies are protected from retaliation by 18 U.S.C. 1514A. Pet. App. 166a. The ARB conducted a comprehensive analysis of Section 1514A, which began with the statute's text and context, *id.* at 146a-154a, then considered its purposes, *id.* at 154a-160a, the broader statutory framework, *id.* at 160a-161a, and the interpretations of analogous whistleblower statutes, *id.* at 161a-166a. The ARB also noted that the Department had taken the view (in prior ARB decisions and in regulations) that Section 1514A's protection is not limited to employees of public companies. *Id.* at 142a-143a.

The ARB's comprehensive analysis in *Spinner* provides an authoritative interpretation of the statute. That authoritative interpretation is correct.

B. Section 1514A's Plain Text Encompasses Employees Of Contractors And Subcontractors Of Public Companies

1. The ARB began its analysis with "the language of the statute itself." Pet. App. 148a (quoting *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 835 (1990)). By its plain text, Section 1514A protects employees of contractors and subcontractors from retaliation when they report fraud or violation of SEC regulations.

Section 1514A provides that "[n]o company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)), or any officer, employee, contractor, subcontractor, or

agent of such company may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against *an employee*" who reports fraud or violation of SEC rules. 18 U.S.C. 1514A(a) (emphasis added). The statute first names a broad range of entities and individuals who are prohibited from engaging in retaliation —a public company or "any officer, employee, contractor, subcontractor, or agent" of "such company." The statute then defines the prohibited conduct—"discharge, demote, suspend, threaten, harass, or in any other manner discriminate." And then it identifies the person protected from such impermissible retaliation—"an employee."

The statute does not define the term "an employee," thereby creating some initial ambiguity about whose employees Congress meant to protect. But in context, the meaning is clear: the "employee[s]" protected by Section 1514A are employees of the employers identified in the preceding part of the sentence. The statute's text "does not restrict its application to employees of publicly held companies." Pet. App. 148a. Rather, it protects from retaliation "an employee" of any of the covered employers. Those are the people the covered employers would have the motivation and means to retaliate against.

2. The court of appeals read "an employee" to refer only to an employee of a public company. Pet. App. 15a-16a. But if Congress had intended the term "an employee" to be limited to certain employees, it easily could have said so. For example, Congress could have "statutorily defin[ed] the term 'employee'" to include only some employees of the covered employers. *Id.* at 148a. Or Congress could have added limiting language after "an employee," such as "an employee of a company reg-

istered under Section 12 or required to file under Section 15(d) of the Exchange Act"—or, more simply, "an employee of such company." See *id.* at 148a, 150a. But Congress did neither of these things.

Congress's omission of limiting language is particularly significant because Congress included limiting language earlier in the same sentence. Congress specified the entities and individuals to which the prohibition on retaliation applies: a public company, or "any officer, employee, contractor, subcontractor, or agent *of such company.*" 18 U.S.C. 1514A(a) (emphasis added). But then in defining the employees protected from retaliation, Congress simply said "an employee," rather than "an employee *of such company.*" That omission must be presumed intentional. See, *e.g.*, *Pacific Operators Offshore, LLP* v. *Valladolid*, 132 S. Ct. 680, 688 (2012).

The absence of that limitation is consistent with Congress's use of broad language throughout Section 1514A to provide expansive protection for persons who report corporate fraud or violation of SEC rules. Section 1514A lists a wide variety of entities and individuals whose conduct is governed by the statute and provides an exhaustive list of the prohibited means of retaliation. The statute applies to "any" specified entity or individual who discriminates in any of the listed ways or "in any other manner" in response to "any" lawful act done by the employee to report "any" conduct that constitutes fraud or violation of SEC rules. See *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("any" is a term of "breadth"); see also Pet. App. 52a (Thompson, J., dissenting) (noting the statute's "intentionally broad language"). If Congress had intended to narrow Section 1514A's reach so that it applied only to a subset of em-

ployees who experienced retaliation, Congress could be expected to have made its intention clear.

3. Other text in Section 1514A reinforces the conclusion that "an employee" includes an employee of a contractor or subcontractor. Section 1514A(a) provides that a covered entity or individual may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment." 18 U.S.C. 1514A(a). If a contractor or subcontractor were taking such action, the most likely target would be its own employees, and the most natural reading of the quoted text is that it focuses on that very conduct by the contractor or subcontractor as the employer of the affected "employee."

Further, Section 1514A specifies that the protected conduct of an "employee" includes furnishing information not only to a federal agency, or a Member or committee of Congress, but also to "a person with supervisory authority over *the employee* (or such other person working for *the employer* who has the authority to investigate, discover, or terminate misconduct)." 18 U.S.C. 1514A(a)(1)(C) (emphases added); see also 18 U.S.C. 1514A(a)(2) (similarly referring to the "employer" in specifying other protected conduct). The complaint procedure set out in the statute likewise refers to "the employer" of an employee. See 18 U.S.C. 1514A(b)(2) (notice of complaint must be given to "the employer"); 49 U.S.C. 42121(b)(2)(B)(ii) and (iv) ("the employer" may demonstrate, by clear and convincing evidence, that it would have taken the same personnel action despite the employee's protected behavior) (incorporated by 18 U.S.C. 1514A(b)(2)). The statute thus plainly is addressed to retaliation in the "employee"-"employer" relationship, and accordingly, applies to

contractors and subcontractors who retaliate against their own employees.

In the court of appeals' view (Pet. App. 17a), however, Congress intended to regulate contractors and subcontractors only when they retaliate against employees of a public company, not against their own employees. Aside from ignoring the natural import of the language Congress chose, that approach renders the statute's references to "contractors" and "subcontractors" largely superfluous. That is because it is "difficult to think of circumstances that would * * * enable a [contractor or] subcontractor to discharge, demote, or suspend the employee of a public company." Pet. App. 101a-102a. It also is difficult to imagine how a contractor or subcontractor could "in any other manner discriminate" against an employee of a public company in that employee's "terms and conditions of employment" with the public company. *Id.* at 150a. The court of appeals hypothesized a situation in which a public company might "contract[] with an ax-wielding specialist" to fire employees. *Id.* at 19a n.11. But in those circumstances, the specialist would be an "agent" of the public company—and an "agent" is separately listed in Section 1514A. See *id.* at 150a-151a.

Further, as the ARB noted in *Spinner*, Section 1514A provides that a successful complainant is entitled to "all relief necessary to make the employee whole," including "reinstatement with the same seniority status" and "back pay." See Pet. App. 150a. It is difficult, if not impossible, to see how a contractor or subcontractor could provide those remedies to an employee of a public company, because a contractor or subcontractor generally would not have the authority to reinstate an employee of a public company to his or her former position

following a successful lawsuit. See *ibid.* And if a contractor or subcontractor had such authority, it likely would be acting as the public company's "agent." See *ibid.*

Respondents contend (Supp. Br. in Opp. 5) that the ARB's interpretation creates the anomaly that a household employee of an officer or employee of a public company would be protected from retaliation by Section 1514A. The ARB has considered and rejected that contention, explaining that the prohibition against an "officer" or "employee" retaliating against "an employee" is meant to impose personal liability on corporate officers and employees who are involved in retaliation against other employees of their employer. Pet. App. 149a (citing 69 Fed. Reg. 52,104, 52,105 (Aug. 24, 2004)); see also, *e.g.*, *Kalkunte* v. *DVI Fin. Servs., Inc.*, Nos. 05-139 & 05-140, 2009 WL 564738, at *8 (ARB Feb. 27, 2009). In such a case, the "employee" who is the victim of retaliation would be an employee of the public company. But that does not mean that employees of public companies are the only ones protected by Section 1514A, because such a reading would make no sense with respect to contractors and subcontractors.

4. Section 1514A's prohibition against retaliation and its administrative enforcement procedures were borrowed from the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. 42121. See S. Rep. No. 146, 107th Cong., 2d Sess. 13, 19, 30 (2002) (Senate Report); Pet. App. 28a-29a. AIR 21 provides that "[n]o air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment" when the employee provides

information to his or her employer or federal authorities about an air safety violation. 49 U.S.C. 42121(a). AIR 21 and Section 1514A use the same framework to prohibit retaliation against whistleblowers, both prohibiting a type of company and any "contractor or subcontractor" of such a company from retaliating against "an employee" who reports wrongdoing. The ARB has consistently construed AIR 21 to cover employees of contractors and subcontractors, see *Evans* v. *Miami Valley Hosp.*, Nos. 07-118 & 07-121, 2009 WL 1898238, at *5-*6 (June 30, 2009); see also Pet. App. 161a-166a, and the Department of Labor has embodied that interpretation in regulations implementing AIR 21 since April 1, 2002—before Section 1514A was enacted, see 67 Fed. Reg. 15,454, 15,458 (2002).

The court of appeals acknowledged that the AIR 21 anti-retaliation provision protects employees of contractors and subcontractors, but found AIR 21 distinguishable because it specifically defines the term "contractor" and does not include an "officer" and "employee" in the list of those against whom the prohibition runs. Pet. App. 29a-30a. Those textual differences are beside the point. What matters here is that both statutes provide that a "contractor" and "subcontractor" of certain companies cannot retaliate against "an employee," and "employee" is naturally understood and has been authoritatively construed by the agency in both contexts to refer to an employee of the contractor or subcontractor. Section 1514A and the anti-retaliation provision in AIR 21 "should be interpreted consistently" because of their parallel statutory text and purposes. *Id.* at 165a.

5. The court of appeals also relied on the headings in Section 1514A to limit the statute's reach. That was error. A statute's heading may be a helpful aid in inter-

preting "some ambiguous word or phrase," but it "cannot limit the plain meaning of the text." *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528-529 (1947). That is particularly true where the title and caption simply provide "a short-hand reference to the general subject matter involved." *Id.* at 528. Here, the text of the statute itself shows that the headings are not meant to be comprehensive.

There are three headings of relevance: (1) the heading of Section 1514A itself—"Civil action to protect against retaliation in fraud cases," 18 U.S.C. 1514A (heading); (2) the heading of subsection (a) of Section 1514A—"Whistleblower Protection for Employees of Publicly Traded Companies," 18 U.S.C. 1514A(a) (heading); and (3) the heading of the relevant section in the public law in which Section 1514A was enacted—"Protection For Employees of Publicly Traded Companies Who Provide Evidence of Fraud," Sarbanes-Oxley Act § 806, 116 Stat. 802. The court of appeals relied (Pet. App. 19a-22a) on the second and third of these to conclude that the statute protects only "employees of publicly traded companies."

But the text of Section 1514A reaches beyond those headings. For example, Section 1514A plainly protects more than employees of "publicly traded companies"—even under the court of appeals' interpretation, it also protects employees of companies that are not publicly traded but are "required to file reports under section 15(d) of the Securities Exchange Act of 1934." 18 U.S.C. 1514A(a); see Pet. App. 13a. Also, Section 1514A is not limited to employees who report evidence of "fraud"; it also includes employees who report violations of "rule[s] or regulation[s] of the Securities and Exchange Commission." 18 U.S.C. 1514A(a)(1). And of course, the

heading of Section 1514A as a whole—"Civil action to protect against retaliation in fraud cases"—is not limited to employees of public companies. 18 U.S.C. 1514A (heading).

The headings on which the court of appeals relied therefore are merely a "short-hand reference to the general subject matter involved." Pet. App. 151a (quoting *Brotherhood of R.R. Trainmen*, 331 U.S. at 528-529). It was "reasonable" for Congress to use these headings for a provision that covers both employees of public companies and "employees of their related entities," because "all protected employees would have some connection to public companies, even if indirectly," and because a title and caption that included all of the "complicated clauses and concepts" in the statute's text would be cumbersome. *Id.* at 107a-108a; see *Brotherhood of R.R. Trainmen*, 331 U.S. at 528 ("Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner."). The court of appeals erred in finding the headings dispositive.

C. Interpreting Section 1514A To Cover Employees Of Contractors And Subcontractors Furthers The Statutory Purposes

1. Considering Section 1514A's text "in conjunction with the purpose and context" makes clear that "only one interpretation is permissible," *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1331 (2011)—the statute protects employees of contractors and subcontractors.

Section 1514A was enacted "as part of the comprehensive effort contained in the Sarbanes-Oxley Act * * * to address corporate fraud." Pet. App. 146a. The Senate Report explains that "[i]n the wake of the con-

tinuing Enron Corporation * * * debacle, the trust of the United States' investors and pensioners in the nation's stock market has been seriously eroded." Senate Report 2. Congress sought to "close gaps in the securities laws" that the collapse of Enron had exposed. Pet. App. 189a (Brown, J., concurring); see Senate Report 6-8.

The Senate Report (at 3) recounts that Enron concocted a scheme to "cook the books" and "trick both the public and federal regulators about how well Enron was doing," and that Enron was able to commit that fraud because of the "extensive participation" of Arthur Andersen—an Enron contractor—"which was simultaneously serving as both consultant and 'independent' auditor for Enron." With "sophisticated professional advice" and using "complex financial structures," Enron and Arthur Andersen "paint[ed] for the investing public a very different picture of the company's financial health than the true picture revealed." *Ibid.* When investors and regulators started asking questions, Arthur Andersen orchestrated the cover-up, "shredding 'tons' of documents," "purg[ing] [its] hard drives" of Enron files, and "encouraging" Enron to destroy documents. *Id.* at 4.

Enron and Arthur Andersen also took steps to ensure that none of their employees would report the fraud. "In a variety of instances when corporate employees at both Enron and Andersen attempted to report or 'blow the whistle' on fraud, * * * they were discouraged at nearly every turn." Senate Report 4-5. For example, a "senior Enron employee" attempted to report "accounting irregularities," and Enron sought advice from outside counsel whether it could be legally liable if it fired the employee. *Id.* at 5. (The answer was no. *Ibid.*) A

"top Enron risk management official" was "cut off from financial information and later resigned" because he had "repeatedly warn[ed] * * * of improprieties in some of the company's off-balance sheet partnerships." *Ibid.*

An "Andersen partner" who "expressed reservations about the firm's financial practices" was "removed from the Enron account" in retaliation for doing so. Senate Report 5. And a "financial adviser at UBS Paine Webber"—another Enron contractor—"was fired for e-mailing his clients to advise them to sell Enron stock." *Ibid.* This "corporate code of silence" allowed "ongoing wrongdoing [to] occur with virtual impunity," creating "serious and adverse" consequences for investors. *Ibid.*

2. Section 1514A must be interpreted to protect contractor and subcontractor employees to accomplish its purposes. As the ARB observed, "Congress plainly recognized that outside professionals—accountants, law firms, contractors, agents, and the like—were complicit in, if not integral to, the shareholder fraud and subsequent cover-up" perpetrated by Enron. Pet. App. 158a. The Senate Report specifically recounts the roles of several Enron contractors, including Arthur Andersen, UBS Paine Webber, and other outside auditors and lawyers. See Senate Report 2-5, 10-11, 18-21. The Senate Report expresses dismay that "[i]nstead of acting as gatekeepers who detect and deter fraud, it appears that Enron's accountants and lawyers brought all their skills and knowledge to bear in assisting the fraud to succeed and then in covering it up." *Id.* at 20-21.

Congress knew it must change "the incentive system" so that "accountants and lawyers who come across fraud in their work" will be willing to report it rather than "remain[ing] silent." Senate Report 21. Congress recognized that employees of contractors—especially ac-

countants, auditors, and lawyers—are often in the best position to uncover fraud. See *id.* at 4-5; Pet. App. 156a. These are the "firsthand witnesses to the fraud" who can provide information about "who knew what, and when." Senate Report 10.

3. The court of appeals relied on general statements in the legislative record about how Section 1514A "would provide whistleblower protection to employees of publicly traded companies" to conclude that Section 1514A protects *only* employees of public companies. See Pet. App. 38a (quoting Senate Report 13); see also *id.* at 18-19; 148 Cong. Rec. 2947 (2002) (statement of Sen. Leahy). That reliance was misplaced, because the cited statements are merely short-hand generalizations about the statute. None of them addresses the question whether Section 1514A applies only to employees of public companies. Pet. App. 152a.

"[N]othing in the legislative history" shows an affirmative congressional intent to "limit whistleblower protection to employees of public companies"; instead, the legislative record "refers positively to extending whistleblower protection in order to encourage the reporting of securities fraud." Pet. App. 60a-61a (Thompson, J., dissenting). The Senate Report identified "protect[ing] whistleblowers who report fraud against retaliation *by their employers*" as one of the key purposes of the Sarbanes-Oxley Act, recognizing that the likely source of retaliation against an employee would be his or her own employer. Senate Report 2 (emphasis added). And in the one instance in which the legislative record specifically addresses the application of the anti-retaliation provision to employees of contractors, it reflects the view that employees of contractors such as

Arthur Andersen and UBS Paine Webber must be protected. See *id.* 4-5.

4. Respondents contend (Br. in Opp. 25-26) that applying Section 1514A to employees of contractors of public companies would extend the statute's coverage to "every employee of every privately held employer." They are mistaken. As the ARB explained, the statute "contains built-in limitations." Pet. App. 166a. Section 1514A applies not to all employees of all contractors of public companies, but only to those who have been retaliated against because they reported fraud against shareholders, violations of four federal anti-fraud laws, or violation of SEC rules and regulations to certain people (a supervisor or other person working for the employee's employer who can investigate misconduct, a Member or committee of Congress, or federal authorities), or participated in a proceeding concerning such a violation. 18 U.S.C. 1514A(a)(1)-(2); see Pet. App. 166a. That is precisely the protection against retaliation that Congress believed necessary to avoid another significant blow to the Nation's financial markets. Senate Report 5, 10, 19-21.

Nor is Section 1514A's application to contractors of public companies anomalous in the context of the Sarbanes-Oxley Act as a whole. "Throughout Sarbanes-Oxley, Congress consistently imposes regulations, obligations, and sanctions upon the contractors, subcontractors, and agents of such companies." Pet. App. 193a & n.73 (Brown, J., concurring). Title I of the Act expands oversight of accounting firms, their outside auditors, and associated persons in order to ensure that audit reports are accurate. See Act §§ 101-107, 116 Stat. 750-768; see also Act § 2(a)(9), (11) and (12), 116 Stat. 747-748. Title II places requirements on auditors to ensure

their independence, so that a company may not serve both as a consultant and outside auditor, as Arthur Andersen did for Enron. See Act §§ 201-206, 116 Stat. 771-775. Title III includes a provision directing the SEC to adopt rules requiring lawyers representing a public company before the SEC to report material securities law violations and breaches of fiduciary duty internally. Act § 307, 116 Stat. 784 (enacting 15 U.S.C. 7245); 17 C.F.R. Pt. 205; see also pp. 27-28, *infra*. Title V sets out rules for securities analysts to avoid conflicts of interest. See Act § 501, 116 Stat. 791-793. Title VI includes a provision codifying the authority of the SEC to discipline lawyers and employees of public accounting firms and their related entities who engage in professional misconduct. Act § 602, 116 Stat. 794. Title VIII, which includes the provision at issue here, also includes criminal penalties applicable to anyone who has committed destruction-of-evidence and fraud offenses. See Act §§ 802, 806, 807, 116 Stat. 800-801, 802-804. Titles IX and XI provide other criminal penalties applicable to any person who has committed the defined offenses. Act §§ 901-905, § 1107, 116 Stat. 804-806, 810.

Section 1514A's application to employees of contractors and subcontractors thus "fits both with [its] specific whistleblower-protection purpose" and with numerous other provisions of the Act that further its "broader anti-fraud purpose." Pet. App. 60a-61a (Thompson, J., dissenting).

D. The Court Of Appeals' Reading Of Section 1514A Leaves Significant And Unwarranted Gaps In Protection Against Retaliation

1. Limiting Section 1514A's protection against retaliation to employees of public companies would "bar a significant class of potential securities-fraud whistle-

blowers from any legal protection." Pet. App. 52a (Thompson, J., dissenting). As the ARB explained, construing Section 1514A "as only protecting employees of publicly traded companies would leave unprotected from retaliation outside accountants, auditors, and lawyers"—the people "who are most likely to uncover and comprehend evidence of potential wrongdoing." *Id.* at 158a. As the ARB explained, that significant gap in whistleblower protection would "sabotage the [statute's] overriding purpose of protecting investors." *Id.* at 161a.

Under the court of appeals' view, the statute would not even apply to employees of Arthur Andersen. That narrow reading of the statute cannot be correct in light of Congress's purpose to "prevent recurrences of the Enron debacle and similar threats to the nation's financial markets," and its recognition that contractors played a significant role in Enron's fraud. Senate Report 2, 4-5, 10.

The court of appeals' view would allow "ongoing wrongdoing [to] occur with virtual impunity," because a public company could rely on its accountants and lawyers to perpetrate and cover up its fraud, knowing that if any employees of those firms started asking questions, they could be fired. Senate Report 4-5 (citing examples). This Court should reject respondents' invitation to create such a statutory loophole. See, *e.g.*, *Kasten*, 131 S. Ct. at 1333; *United States* v. *Hayes*, 555 U.S. 415, 426-428 (2009).

2. The resulting gap in protection would be especially troubling with respect to mutual fund companies. All agree that Section 1514A applies to mutual funds.[3] Mu-

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[3] Most mutual funds are companies "that [are] required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d))." 18 U.S.C. 1514A(a); see Investment Co. Inst.,

tual fund investment advisers manage more than $13 trillion on behalf of investors. Investment Co. Inst., *2013 Investment Company Fact Book* 9 (53d ed.), http://www.icifactbook.org/pdf/2013_factbook.pdf. "Nearly all mutual funds are structured such that they have no employees of their own, and instead contract with, and rely primarily upon, employees of privately-held investment advisors to function." Pet. App. 186a (Brown, J., concurring); see also, *e.g.*, *Jones* v. *Harris Assocs. L.P.*, 559 U.S. 335, 338 (2010). The Fidelity funds follow this pattern: they "have no employees of their own" and instead depend on contractors like respondents for their day-to-day operations. Pet. App. 4a, 26a-27a. Under the court of appeals' view, no person who works for such a mutual fund would be protected from retaliation under Section 1514A, because the mutual fund has no employees, and the people who run the mutual funds' business are employees of contractors, who the court of appeals said would not be covered. Pet. App. 121a.

Respondents (Supp. Br. in Opp. 8) and the court of appeals (Pet. App. 26a-27a) acknowledge this result, but deem it acceptable because Congress has regulated investment advisers to mutual funds in the Investment Company Act of 1940, 15 U.S.C. 80a-1 *et seq.*, and the Investment Advisers Act of 1940, 15 U.S.C. 80b-1 *et seq.* See Pet. App. 26a-27a. That assurance is illusory, because neither of those statutes contains any anti-retaliation provision that would protect employees of investment advisers to mutual funds. The Investment

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2013 Investment Company Fact Book 9 (53d ed.), http://www.icifactbook.org/pdf/2013_factbook.pdf 2013. A few funds are publicly traded companies. See *ibid.*; see also SEC, *Closed-end Fund*, http://investor.gov/glossary/glossary_terms/closed-end-fund.

Company Act is the foundational statute regulating the formation and operation of mutual funds and other investment companies and the conduct of advisers to those companies; it sets out guidelines for investment company structure and operations and requires certain disclosures to the public about fund operations and objectives. See, *e.g.*, 6 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 20.1 (2009). The Investment Advisers Act requires persons who provide investment advice for compensation (including advisers to mutual funds) to register with the SEC and follow certain rules. See, *e.g.*, SEC, *General Information on the Regulation of Investment Advisers*, http://www.sec.gov/divisions/investment/iaregulation/memoia.htm.

The fact that investment advisers and mutual fund companies are regulated in other ways does not ensure that employees of mutual fund investment advisers can report fraud without fear of retaliation. And Congress's extensive regulation of mutual fund advisers reinforces the conclusion that Congress intended to protect their employees from retaliation because of the central role they play in investment markets.[4]

3. The court of appeals' interpretation of Section 1514A also creates a significant gap in protection for

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[4] Respondents contend (Supp. Br. in Opp. 8) that Section 1514A must not apply to employees of investment advisers because Congress failed to enact a 2004 bill that would have expressly added to Section 1514A coverage of investment advisers, principal underwriters, and significant service providers to registered investment companies. The bill was never reported out of committee; there was no debate or vote on it; and the record contains "no statement" of the "sponsors' understanding of [the bill] or of § 1514A(a)." Pet. App. 42a-43a. The failed bill therefore sheds no light on Section 1514A's reach at the time it was enacted. See, *e.g.*, *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990).

outside lawyers who advise public companies on securities issues. At the same time it enacted Section 1514A, Congress enacted a provision directing the SEC to adopt rules placing reporting requirements on lawyers involved with a public company's financial disclosures. Sarbanes-Oxley Act § 307, 116 Stat. 784 (enacting 15 U.S.C. 7245). In particular, Congress required the rules to provide that any attorney who represents a publicly held company before the SEC must "report evidence of a material violation of securities law or breach of fiduciary duty" by that company to the company's general counsel or CEO; if the general counsel or CEO does not take appropriate remedial action, the attorney must report the conduct to the company's audit committee or board of directors. *Ibid.*; see 17 C.F.R. Pt. 205 (SEC regulations). As the ARB explained in *Spinner*, it is "difficult to imagine" that Congress would have enacted the broad protection against retaliation in Section 1514A but then "le[ft] unprotected outside counsel who are required under Section 307 of [the Sarbanes-Oxley Act] to report" securities law violations. Pet. App. 158a n.16.

4. Respondents and the court of appeals suggest that it is not necessary for Section 1514A to protect employees of contractors and subcontractors because other parts of the Sarbanes-Oxley Act regulate these entities. Supp. Br. in Opp. 8-9; Pet. App. 24a, 27a n.13, 40a. But none of the cited provisions protects against retaliation for reporting fraud or violation of SEC rules. For example, Congress's creation of the Public Company Accounting Oversight Board to regulate the conduct of accounting firms in auditing public companies' financial statements (see Pet. App. 24a) does nothing to protect an accountant who is retaliated against for reporting

fraud or violation of SEC rules. See 15 U.S.C. 7211(c)(1) (Supp. V 2011).

Likewise, 18 U.S.C. 1513 (2006 & Supp. V 2011) is a general obstruction of justice statute, not a provision specific to the securities industry. It criminalizes retaliation for reporting a "Federal offense" to a "law enforcement officer," 18 U.S.C. 1513(e) (Supp. V 2011), but it does not contain a remedy for an employee who is retaliated against for reporting fraud or violation of SEC rules to his or her employer or the SEC.

5. a. Congress's enactment of a new anti-retaliation provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (Dodd-Frank Act), does not make Section 1514A's application to employees of contractors unnecessary. Section 922 of that Act establishes a "Whistleblower Program," modeled on a 2006 Internal Revenue Service program, that offers financial incentives "to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws and recover money for victims of financial fraud." S. Rep. No. 176, 111th Cong., 2d Sess. 110-111 (2010) (Dodd-Frank Senate Report). To encourage participation, Congress provided that "[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment" because the whistleblower provided information to the SEC, participated in an SEC proceeding, or made disclosures required or protected under various federal securities laws, including the Sarbanes-Oxley Act. Dodd-Frank Act § 922(a), 124 Stat. 1845-1846.

Although this new provision and Section 1514A both protect against retaliation, Section 922 focuses on encouraging reporting to federal authorities, whereas Section 1514A covers both internal and external reporting. In the context of internal reporting, Section 922's protection extends no further than Section 1514A's protection, because Section 922 protects persons who make "disclosures that are required or protected under" the Sarbanes-Oxley Act. Dodd-Frank Act § 922(a), 124 Stat. 1846. So if employees of contractors of public companies are not protected under Section 1514A, they are not protected for making internal complaints under Section 922 of the Dodd-Frank Act.

b. In the Dodd-Frank Act, Congress also added nationally recognized statistical rating organizations (NRSROs) and certain subsidiaries of public companies to the list of covered entities and individuals in Section 1514A. See §§ 922(b), 929A, 124 Stat. 1848, 1852. The court of appeals believed that amendment would have been unnecessary if the statute already protected contractor employees. Pet. App. 43a-46a. That is mistaken. First, not all NRSROs are contractors of public companies.[5] Second, the amendment also added subsidiaries of public companies to Section 1514A in order to eliminate an attempted defense by public companies that blamed

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[5] An NRSRO is a credit rating agency—a company that assesses the creditworthiness of an issuer (such as a publicly held company) with respect to specific securities. See SEC, *Credit Rating Agencies and Nationally Recognized Statistical Rating Organizations*, http://www.sec.gov/answers/nrsro.htm. In 2010, three NRSROs were subsidiaries of public companies and two of the remaining seven were paid by subscribers, not by publicly held companies. See SEC, *Annual Report on Nationally Recognized Statistical Rating Organizations* 6-7 & n.12, 11-12 (Mar. 2012), http://www.sec.gov/divisions/marketreg/ratingagency/nrsroannrep0312.pdf.

retaliation on "subsidiaries and affiliates." Dodd-Frank Senate Report 114; see Pet. App. 44a. There was no discussion about the question here—whether Section 1514A protects employees of contractors.

Tellingly, the court of appeals assumed that as a result of the amendments, Section 1514A now protects employees of NRSROs and subsidiaries. Pet. App. 43a-44a. Simply as a matter of grammar, the same should be true for employees of contractors and subcontractors. See *id.* at 62a-63a (Thompson, J., dissenting) (explaining that, in the structure of Section 1514A, "'contractor' and 'rating organization' are syntactic equivalents" and "should therefore be given equal effect"). That is especially true because, by the time of the Dodd-Frank Act's enactment, the Department of Labor had issued regulations providing that Section 1514A protects employees of contractors and subcontractors. See *id.* at 63a; see also pp. 31-32, *infra*.

E. Respondents' Arguments Opposing Deference Lack Merit

As the foregoing discussion demonstrates, the ARB's conclusion in *Spinner* that contractor employees are protected is at the very least a reasonable interpretation of Section 1514A and therefore is entitled to *Chevron* deference. Even before its precedential and on-point decision in *Spinner*, the ARB had consistently viewed Section 1514A's protection as not limited to employees of public companies. See Pet. App. 143a-144a.[6] OSHA

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[6] See, *e.g.*, *Charles* v. *Profit Inv. Mgmt.*, No. 10-071, 2011 WL 6981992, at *4-*5 (ARB Dec. 16, 2011) (rejecting the conclusion that an employee of a private company was not covered because Section 1514A "covers only employees of publicly traded companies"); *Funke* v. *Federal Express Corp.*, No. 09-004, 2011 WL 3307574, at *5-*6 (ARB July 8, 2011) (holding that Section 1514A

also had taken the view, in its regulations setting out the procedures for filing and adjudicating complaints, that Section 1514A applies to employees of contractors and subcontractors of public companies. See 29 C.F.R. 1980.101, .102(a); 69 Fed. Reg. at 52,105-52,106 (stating in preamble that "[t]he statute * * * protects the employees of publicly traded companies as well as the employees of contractors, subcontractors, and agents of those publicly traded companies").[7]

Respondents contend (Supp. Br. in Opp. 10-12) that *Chevron* deference is unwarranted because the ARB's decision in *Spinner* was controlled by the regulations, and the agency stated in the preamble to the regulations that it is intended to "provide procedures for the handling of Sarbanes-Oxley discrimination complaints" and not to "provide statutory interpretations." 69 Fed. Reg. at 52,105. But the ARB did not rely solely on the regulations; it conducted an exceptionally thorough analysis of Section 1514A's text and purposes and the broader statutory framework. See Pet. App. 139a-166a. The fact

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covers disclosure of third-party fraud and noting that "Congress understood that to effectively address corporate fraud, the law needed to extend to entities *related* to public companies—accounting firms, law firms, and the like—which may themselves be involved in performing or disguising fraudulent activity"); *Johnson* v. *Siemens Bldg. Techs., Inc.*, No. 08-032, 2011 WL 1247202, at *12 (ARB Mar. 31, 2011) (holding that an employee of a subsidiary of a public company was covered by the statute and explaining that Section 1514A reaches "more than employees of publicly traded companies").

[7] In discussing the regulations, the court of appeals (Pet. App. 47a-48a) referred to the 2004 final rule. The regulations have been amended since 2004 and some terminology has changed, but they continue to prohibit retaliation against an employee of a contractor or subcontractor of a public company. See 29 C.F.R. 1980.101(f) and (g), 1980.102(a); see also 76 Fed. Reg. 68,084 (Nov. 3, 2011).

that OSHA already had taken the same view of the statute in the procedural regulations reinforces, rather than undercuts, the ARB's conclusion.[8]

Respondents also contend (Br. in Opp. 18) that the Department of Labor "cannot claim any special expertise in resolving statutory ambiguities" because the statute includes a procedure under which a complainant can go to court if the agency has not acted within a certain time. Section 1514A requires any person seeking relief under the section to first "fil[e] a complaint with the Secretary of Labor." 18 U.S.C. 1514A(b)(1)(A). The reason for that provision is that the Department has expertise in investigating and adjudicating complaints of retaliation. It is only if the Department has not rendered a final decision within 180 days that the complainant may proceed to court. 18 U.S.C. 1514A(b)(1)(B).[9] That provision reasonably balances the Department's need to manage its docket with the complainant's desire for a prompt decision on his or her claim. See 76 Fed. Reg. 68,084, 68,091 (Nov. 3, 2011) ("The purpose of the

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[8] Although the Department argued for deference to the regulations under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), in the court of appeals, it did not seek *Chevron* deference to the regulations, see Dep't of Labor C.A. Br. 18 n.8, and the United States does not seek *Chevron* deference to them before this Court. That is not to say, however, that the Secretary lacks the authority to issue regulations embodying interpretations to guide OSHA and the ARB in their enforcement of Section 1514A that would in turn warrant *Chevron* deference, especially if adopted through notice-and-comment rulemaking. See, *e.g.*, *Mead Corp.*, 533 U.S. at 229-231.

[9] Several other anti-retaliation statutes contain provisions like this. See, *e.g.*, 6 U.S.C. 1142(c)(7); 12 U.S.C. 5567(c)(4)(D)(i) (Supp. V 2011); 15 U.S.C. 2087(b)(4) (Supp. V 2011); 21 U.S.C. 399d(b)(4) (Supp. V 2011); 42 U.S.C. 5851(b)(4); 49 U.S.C. 20109(d)(3) (Supp. V 2011); 49 U.S.C.A. 30171(b)(3)(E); 49 U.S.C. 31105(c) (Supp. V 2011).

'kick-out' provision is to aid the complainant in receiving a prompt decision."). It was added to Section 1514A as part of a compromise on what damage awards would be available; nothing in the legislative record suggests any doubts about the Department's expertise. See Senate Report 30, 36.

Congress has charged the Department of Labor with enforcing more than two dozen anti-retaliation provisions throughout the United States Code, see 77 Fed. Reg. at 3912 (Jan. 25, 2012) (listing examples), recognizing its substantial expertise on such matters. There is no reason to reject the ARB's thorough and thoughtful resolution of the question presented here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 2013

APPENDIX

1. As enacted by the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 18 U.S.C. 1514A provided:

Civil action to protect against retaliation in fraud cases

(a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES.—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—
>
> (A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

(b) ENFORCEMENT ACTION.—

(1) IN GENERAL.—A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by—

(A) filing a complaint with the Secretary of Labor; or

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

(2) PROCEDURE.—

(A) IN GENERAL.—An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

(B) EXCEPTION.—Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

(C) BURDENS OF PROOF.—An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.

(D) STATUTE OF LIMITATIONS.—An action under paragraph (1) shall be commenced not later than 90 days after the date on which the violation occurs.

(c) REMEDIES.—

(1) IN GENERAL.—An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

(2) COMPENSATORY DAMAGES.—Relief for any action under paragraph (1) shall include—

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) the amount of back pay, with interest; and

(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(d) RIGHTS RETAINED BY EMPLOYEE.—Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.

2. As amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, 18 U.S.C. 1514A provides:

Civil action to protect against retaliation in fraud cases

(a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES.—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c),[1] or any officer, employee, contractor, subcontractor, or agent of such company or nationally recog-

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[1] So in original. Another closing parenthesis probably should precede the comma.

nized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

(b) ENFORCEMENT ACTION.—

(1) IN GENERAL.—A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by—

(A) filing a complaint with the Secretary of Labor; or

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

(2) PROCEDURE.—

(A) IN GENERAL.—An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

(B) EXCEPTION.—Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

(C) BURDENS OF PROOF.—An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.

(D) STATUTE OF LIMITATIONS.—An action under paragraph (1) shall be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation.

(E) JURY TRIAL.—A party to an action brought under paragraph (1)(B) shall be entitled to trial by jury.

(c) REMEDIES.—

(1) IN GENERAL.—An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

(2) COMPENSATORY DAMAGES.—Relief for any action under paragraph (1) shall include—

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) the amount of back pay, with interest; and

(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(d) RIGHTS RETAINED BY EMPLOYEE.—Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.

(e) NONENFORCEABILITY OF CERTAIN PROVISIONS WAIVING RIGHTS AND REMEDIES OR REQUIRING ARBITRATION OF DISPUTES.—

(1) WAIVER OF RIGHTS AND REMEDIES.—The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.

(2) PREDISPUTE ARBITRATION AGREEMENTS.—No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

3. 49 U.S.C. 42121 provides in pertinent part:

Protection of employees providing air safety information

* * * * *

(b) DEPARTMENT OF LABOR COMPLAINT PROCEDURE.—

(1) FILING AND NOTIFICATION.—A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person named in the complaint and the

Administrator of the Federal Aviation Administration of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

(2) INVESTIGATION; PRELIMINARY ORDER.—

(A) IN GENERAL.—Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the person named in the complaint an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) of the Secretary's findings. If the Secretary of Labor concludes that there is a reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a

hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be conducted expeditiously. If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.

(B) REQUIREMENTS.—

(i) REQUIRED SHOWING BY COMPLAINANT.—The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(ii) SHOWING BY EMPLOYER.—Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(iii) CRITERIA FOR DETERMINATION BY SECRETARY.—The Secretary may determine that a violation of subsection (a) has occurred

only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(iv) PROHIBITION.—Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(3) FINAL ORDER.—

(A) DEADLINE FOR ISSUANCE; SETTLEMENT AGREEMENTS.—Not later than 120 days after the date of conclusion of a hearing under paragraph (2), the Secretary of Labor shall issue a final order providing the relief prescribed by this paragraph or denying the complaint. At any time before issuance of a final order, a proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.

(B) REMEDY.—If, in response to a complaint filed under paragraph (1), the Secretary of Labor determines that a violation of subsection (a) has occurred, the Secretary of Labor shall order the person who committed such violation to—

(i) take affirmative action to abate the violation;

(ii) reinstate the complainant to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and

(iii) provide compensatory damages to the complainant.

If such an order is issued under this paragraph, the Secretary of Labor, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, the bringing the complaint upon which the order was issued.

(C) FRIVOLOUS COMPLAINTS.—If the Secretary of Labor finds that a complaint under paragraph (1) is frivolous or has been brought in bad faith, the Secretary of Labor may award to the prevailing employer a reasonable attorney's fee not exceeding $1,000.

(4) REVIEW.—

(A) APPEAL TO COURT OF APPEALS.—Any person adversely affected or aggrieved by an order issued under paragraph (3) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, al-

legedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor. Review shall conform to chapter 7 of title 5, United States Code. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the order.

(B) LIMITATION ON COLLATERAL ATTACK.—An order of the Secretary of Labor with respect to which review could have been obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.

(5) ENFORCEMENT OF ORDER BY SECRETARY OF LABOR.—Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.

(6) ENFORCEMENT OF ORDER BY PARTIES.—

(A) COMMENCEMENT OF ACTION.—A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The ap-

propriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

(B) ATTORNEY FEES.—The court, in issuing any final order under this paragraph, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

* * * * *

4. 29 C.F.R. 1980.101 (2005) provides in pertinent part:

Definitions.

* * * * *

Company means any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) and any company required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)).

Company representative means any officer, employee, contractor, subcontractor, or agent of a company.

* * * * *

Employee means an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose em-

ployment could be affected by a company or company representative.

* * * * *

5. 29 C.F.R. 1980.102 (2005) provides:

Obligations and prohibited acts.

(a) No company or company representative may discharge, demote, suspend, threaten, harass or in any other manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, has engaged in any of the activities specified in paragraphs (b)(1) and (2) of this section.

(b) An employee is protected against discrimination (as described in paragraph (a) of this section) by a company or company representative for any lawful act:

(1) To provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of 18 U.S.C. 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

(i) A Federal regulatory or law enforcement agency;

(ii) Any Member of Congress or any committee of Congress; or

(ii) A person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) To file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of 18 U.S.C. 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-3

In The
Supreme Court of the United States

JACKIE HOSANG LAWSON AND
JONATHAN M. ZANG,
Petitioners.

v.

FMR LLC, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND GOVERNMENT ACCOUNTABILITY PROJECT IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. Congress Expressly Included Employees of Non-Public Contractors in the Statutory Language 4

II. The First Circuit's Decision Ignores the Historical Purpose of the Act 7

III. The Department Of Labor's Regulations Warrant Deference 10

IV. Sarbanes-Oxley Incorporates Language From AIR21, Further Supporting This Interpretation 10

V Remedial Statutes Like Sarbanes-Oxley Must Be Read Broadly 12

a. ARB Adjudications Should Be Afforded *Chevron* Deference To The Extent That The Department of Labor Is Clarifying The Statute Through Its Active Adjudication Of Cases Under SOX And Where The Department of Labor Is Explaining How Its Decision Is Furthering The Law's Remedial Purpose 13

b. The Cramped Interpretation of Sarbanes-Oxley In The Pre-2008 Period, Contributed To The Economic Crisis of 2008 16

c. A Broad Application Of Sarbanes-Oxley to Contractors And Subcontractors Of Mutual Fund Holding Companies Will Help To Prevent A Similar Catastrophe In Mutual Fund Industry 19

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

CASES

Charles v. Profit Inv. Mgmt.,
ARB No. 10-071,
ALJ No. 2009-SOX-040 (ARB Dec. 16, 2011) 15

Chevron U.S.A., Inc. v.
Natural Resources Def. Council, Inc.,
467 U.S. 837 (1984) ..... *passim*

Daily Income Fund, Inc. v. Fox,
464 U.S. 523 (1984) 20

English v. General Elec. Co.,
496 U.S. 72 (1990) 12

Evans v. Miami Valley Hospital,
ARB Nos. 07-118,
ALJ No. 2006-AIR-22 (ARB June 30, 2009) 11

FCC v. Fox Television,
556 U.S. 502 (2009) 15

Funke v. Federal Express Corp,
ARB No. 09-004,
ALJ No. 2007-SOX-043 (ARB July 8, 2011) 15

Herman & MacLean v. Huddleston,
459 U.S. 375 (1983) 12

Johnson v. Siemens Building Techs.,
ARB No. 08-032,
ALJ No. 2005-SOX-015 (ARB Mar. 31, 2011) 15

Jones v. Harris Associates L.P.,
559 U.S. 335 (2010) 20

Kansas Gas & Elec. Co. v. Brock,
780 F.2d 1505 (10th Cir. 1985) 12

Lamie v. U.S. Tr.,
540 U.S. 526 (2004) 4

Lawson v. FMR LLC,
670 F.3d 61 (1st Cir. 2012), *cert. granted*,
133 S. Ct. 2387 (U.S. 2013) 13

Liparota v. United States,
471 U.S. 419 (1985) 13

Lockheed Martin Corp. v.
Admin. Review Bd., U.S. Dep't of Labor,
11-9524,
2013 WL 2398691 (10th Cir. 2013) 16

NLRB v. Scrivener,
405 U.S. 117 (1972) 12

Passaic Valley Sewerage Comm. v. Dep't of Labor,
992 F.2d 474 (3d Cir. 1993) 12

Peck v. Safe Air International, Inc.,
ARB No. 02-028,
ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004) 11

Russello v. United States,
464 U.S. 16 (1983) 5

SEC v. Capital Gains Research Bureau, Inc.,
375 U.S. 180 (1963) 12

Spinner v. David Landau and Associates, LLC,
2012 WL 2073374 (ARB May 31, 2012) 14, 15

United States v. Mead Corp.,
533 U.S. 218 (2001) 15, 16

Walters v. Deutsche Bank AG,
2008-SOX-70 (ALJ Mar. 23, 2009) 9

Welch v. Chao,
536 F.3d 269 (4th Cir. 2008) 16

Wiest v. Lynch,
710 F.3d 121 (3d Cir. 2013) 4, 16

Zipes v. Trans World Airlines, Inc.,
455 U.S. 385 (1982) 12

STATUTES

15 U.S.C. § 78c 6

15 U.S.C. § 78o(d) 4, 5

15 U.S.C. § 78l 4, 5

18 U.S.C. § 1514A 2

18 U.S.C. § 1514A(a) 4, 6

18 U.S.C. § 1514A(b) 14

18 U.S.C. § 1514A(b)(2)(C) 11

49 U.S.C. § 42121(a) 11

49 U.S.C. § 42121(b) 11

RULES

S. Ct. R. 37.2 1

S. Ct. R. 37.6 1

REGULATION

29 C.F.R. § 1980.101 10

OTHER AUTHORITIES

148 CONG. REC. 6439-6440, 107th Congress, 2d Session (2002) 2

Chamber's comments at http:// www.sec.grov/ comments/s7-33-10/s73310-110.pdf 21

Congressional Record, S7358, July 25, 2002 8

Pub. L. No. 106-181, § 519(a), 114 Stat. 61 11

Pub. L. No. 111–203 §§ 922(b), 929A, 124 Stat. 1376, 1848 (2010) 6

Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. Rev. 1 (2012) 16, 18, 19

Richard Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 Wm. & Mary L. Rev. 65 (2007) 18

S. Rep. No. 107-146 (2002) 7

Senate Banking Committee Lægis. History, Vol. III 8

INTEREST OF *AMICI CURIAE*[1]

The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment, and civil rights disputes. NELA and its 68 circuit, state, and local Affiliates have more than 3,000 members nationwide committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the workplace rights of individuals.

The Government Accountability Project (GAP) is a non-partisan, non-profit organization specializing in legal and other advocacy on behalf of whistleblowers. GAP has a 30-year history of working on behalf of government and corporate employees who expose illegality, gross waste and mismanagement, abuse of authority, substantial or

---

[1] Pursuant to S. Ct. R. 37.6, *Amici* submit that no counsel for any party participated in the authoring of this document, in whole or in part. In addition, no other person or entity, other than *Amici*, has made any monetary contribution to the preparation and submission of this document. Pursuant to S. Ct. R. 37.2, letters consenting to the filing of this Brief have been filed with the Clerk of the Court.

specific dangers to public health and safety, or other institutional misconduct undermining the public interest. GAP led the citizen campaign for passage of the whistleblower provisions of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley or SOX), 18 U.S.C. § 1514A, and is cited in its legislative history. *See* 148 CONG. REC. 6439-6440, 107th Congress, 2d Session (2002). It also has led the campaigns for passage of eleven other corporate whistleblower laws since 2002 that are based on the SOX model.

SUMMARY OF ARGUMENT

The First Circuit erred in excluding the employees of private contractors and subcontractors from the antiretaliation provision of the Sarbanes-Oxley Act. The most natural reading of this provision and the legislative history of the Act demonstrate that Congress intended to cover these employees. Further, the United States Department of Labor's implementing regulations, which warrant deference, support the Sarbanes-Oxley Act's application in the case of private contractors and subcontractors. Finally, the Sarbanes-Oxley Act must be read broadly in order to accomplish its remedial purpose.

ARGUMENT

The Sarbanes-Oxley Act was enacted in the aftermath of the Enron debacle. Yet Enron had virtually no direct employees. Enron fragmented its critical functions among non-public affiliates and its non-public accounting firm Arthur Andersen. The First Circuit's cramped reading of the Sarbanes-

Oxley Act would deny whistleblower protection to the employees of these non-public affiliates, even though these were the very employees that Congress intended to protect.

The remedial nature of Sarbanes-Oxley calls for broad and inclusive application. An interpretation of "employee" that limits coverage to employees of public companies would undermine Sarbanes-Oxley's basic purpose. Publicly traded companies increasingly use a variety of contractual relationships to separate functions into organizations focused on those functions. Many of these functions, such as accounting, compliance testing and investigations, naturally touch on compliance issues. An interpretation of the term "employee" to cover employees of private contractors and subcontractors is consistent with the plain text of the statute, the legislative history, the remedial purpose, and Department of Labor procedural regulations and policy implementing Section 806. A contrary interpretation would leave a significant number of employees unprotected. These employees are in a position to expose corporate fraud. In the context of the mutual fund industry, all the employees would be without whistleblower protection under Section 806. Broad and inclusive application of Sarbanes-Oxley is necessary to prevent a crisis in the mutual fund industry, such as the one that occurred in the banking sector in 2008.

I. Congress Expressly Included Employees of Non-Public Contractors in the Statutory Language.

Interpretation of the statute begins with the plain text. "It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534, 124 S. Ct. 1023, 1030, 157 L. Ed. 2d 1024 (2004) (internal quotes omitted).

Under Section 806 of Sarbanes-Oxley, 18 U.S.C. § 1514A(a) (2010), a covered company is a "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d))" or "any officer, employee, contractor, subcontractor, or agent of such company." Congress did not qualify or limit this definition. The most natural reading of this provision is that the statute's protections cover "an employee" of any of the categories listed, including contractors and subcontractors. The court below complains that the personal employees of an officer would not be likely whistleblowers, but the scandal at Tyco exemplifies how an officer's personal employees may have information that could be helpful in securities enforcement cases. *See Wiest v. Lynch*, 710 F.3d 121, 124-25 (3d Cir. 2013). The issue of whether a particular employee can provide information that reasonably relates to securities violations addresses the scope of protected activity, not coverage.

Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally. *See Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983). If it was Congress's intention to restrict Section 806's protections to employees of public companies, it would have used the phrase "an employee of such company," rather than "an employee," just as Congress limited the entities who are prohibited from discriminating to public companies or "any . . . contractor, subcontractor, or agent of such company[.]" By using the specific phrase "of such company" in identifying those who are prohibited from engaging in retaliation, while omitting similar language in identifying those employees who are protected from retaliation, Congress indicated it was not limiting protections of Section 806 to employees of public companies.

The First Circuit incorrectly held that the 2010 amendment of Section 806, as part of the Dodd-Frank Act, demonstrates that Section 806 only covers employees of publicly-traded companies. As amended, Section 806 now reads:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)) including any subsidiary or affiliate whose financial information is included in the

> consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c)), or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

18 U.S.C. § 1514A(a), as amended by Pub. L. No. 111–203 §§ 922(b), 929A, 124 Stat. 1376, 1848, 1852 (2010).

The First Circuit's reading guts the statutory language. If Section 806 protects only the employees of public companies, then "contractors, subcontractors and agents" are liable under Section 806 only if they themselves are publicly-traded, or if they are alleged to have engaged in retaliation against the employees of their publicly-traded client. The most logical reading of Section 806 is that "an employee" (protected from retaliation) includes employees of the non-public "contractor, subcontractor, or agent" enumerated above for reporting violations concerning the public company for which they are performing work.

II. The First Circuit's Decision Ignores the Historical Purpose of the Act.

Congress enacted Sarbanes-Oxley in the wake of the Enron scandal to restore investor confidence in the nation's financial markets. *See* S. Rep. No. 107-146 (2002). The legislative history demonstrates that Congress was concerned not only with the fraud committed by Enron, a publicly traded company, but also with the actions of its contractor, Arthur Andersen LLP, a privately held firm and its proliferation of non-public affiliates,. *See id.* at 2 ("Enron apparently, with the approval or advice of its accountants, auditors and lawyers, used thousands of off-the-book entities to overstate corporate profits, understate corporate debts and inflate Enron's stock price."). In describing the "corporate code of silence," which "not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity," Congress enumerated examples of employees who faced retaliation for raising concerns about the companies' practices. *See id.* at 5. These examples included retaliation by Arthur Andersen, a private company, against one of its own partners. *See id.*

Enron's S-4 registration statement, filed with the SEC on October 9, 1996, states: "Essentially all of Enron's operations are conducted through its subsidiaries and affiliates..." When Senator Leahy reported on the whistleblower provision, he described it in the context of Enron:

> Look what they were doing on this chart. There is no way we could have known about this without that kind of a whistleblower. Look at this. They had all these hidden corporations-Jedi, Kenobi, Chewco, Big Doe-I guess they must have had "little doe"-Yosemite, Cactus, Ponderosa, Raptor, Braveheart, Ahluwalia, . . . The fact is, they were hiding hundreds of millions of dollars of stockholders' money in their pension funds. The provisions Senator Grassley and I worked out in Judiciary Committee make sure whistleblowers are protected.

Congressional Record, S7358, July 25, 2002 (emphasis added.)

Yet under the First Circuit's standard, the employees of Enron's non-public accounting firm that Congress meant to protect would not be protected, simply because they were not directly employed by the publicly-traded parent.

Senator Durbin said that Section 806 "creates protections for corporate whistleblowers. We need them. If insiders don't come forward, many times you don't know what is happening in large corporations." Senate Banking Committee Legis. History, Vol. III, at 1294. These goals would be completely frustrated if international companies simply moved their fraudulent activities to non-public contractors. It flouts the obvious purpose of Congress to hold that, notwithstanding its central

concern with Enron's "hidden corporations," it did not intend to protect the very whistleblowers at the subsidiary who would be in a position to blow the whistle on that fraud.

The few direct employees of the parent Enron would not have been in the same position. If the securities laws are designed to reach the conduct of "controlled" non-public contractors, then it follows that SOX whistleblower protection was intended to reach their employees as well. As Judge Levin correctly held in *Walters v. Deutsche Bank AG*, 2008-SOX-70, at 8 (ALJ Mar. 23, 2009):

> [T]he legislative history of Sarbanes-Oxley would seem to confirm that Section 806 was meant to include an agent or contractor like the accounting firm of Arthur Andersen, not because there was any evidence that Andersen implemented Enron's personnel actions, but because Congress hoped an insider in an Arthur Andersen situation would blow the whistle on the type of fraud Arthur Andersen helped to conceal. Yet, application of the labor agency test probably would have been fatal to the claim of an Andersen whistleblower, and has been fatal to claims of whistleblowers in wholly owned subsidiaries . . . Under such circumstances, simply to state the labor law test in the context of Sarbanes-Oxley seems sufficient to refute it, because it leaves essentially

unchanged conditions Congress passionately wanted to reform.

III. The Department Of Labor's Regulations Warrant Deference.

The Department of Labor's regulations implementing Section 806 support its application in the case of contractors and subcontractors. The implementing regulations apply to both "company" and/or "company representative[s]." 29 C.F.R. § 1980.101. The implementing regulations further define a "company representative" as "any officer, employee, contractor, subcontractor, or agent of a [public] company." *Id.* Thus, under the implementing regulations, both (i) public companies and (ii) any "contractor, subcontractor, [and] agent" of a public company, are covered under Sarbanes-Oxley. The implementing regulations make no distinction between public and private companies. *Id.*

This court affords deference to the Department of Labor's interpretation of the Act as expressed in formal regulations under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

IV. Sarbanes-Oxley Incorporates Language From AIR21, Further Supporting This Interpretation.

Sarbanes-Oxley's burden of proof scheme is drawn from the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century,

also known as AIR21.[2] Sarbanes-Oxley provides that whistleblower actions "shall be governed by the legal burdens of proof set forth in § 42121(b) of title 49, United States Code," citing to AIR21. *See* 18 U.S.C. § 1514A(b)(2)(C).

AIR21's prohibition against retaliation states, "No air carrier ***or contractor or subcontractor*** of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)" engaged in protected conduct as defined under the act. 49 U.S.C.A. § 42121(a) (emphasis added).

In applying AIR21, the ARB has correctly stated that the statute does not require that the air carrier employ the claimant for the statute to cover the claimant. *See, e.g., Evans v. Miami Valley Hospital*, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-22 (ARB June 30, 2009); *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). It is logical to conclude, given the importation of AIR21's burden of proof scheme, that Congress intended to protect employees of contractors and subcontractors as these employees are protected under AIR21.

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[2] Pub. L. No. 106-181, § 519(a), 114 Stat. 61, 146-47 (codified in various sections of 49 U.S.C.).

V. Remedial Statutes Like Sarbanes-Oxley Must Be Read Broadly.

This Court has "repeatedly recognized that securities laws combating fraud should be construed 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes.'" *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386–87, 103 S. Ct. 683, 689, 74 L. Ed. 2d 548 (1983) (quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195, 84 S. Ct. 275, 284, 11 L. Ed. 2d 237 (1963)). The legislative history described above demonstrates that Sarbanes-Oxley, in particular, was enacted to remedy the issue of retaliation against whistleblowers such as those at Enron and Arthur Andersen.

The Court and the Courts of Appeal have also routinely held that whistleblower provisions must be given broad scope to accomplish their remedial purposes. *NLRB v. Scrivener* (1972), 405 U.S. 117, 121-26; *English v. General Elec. Co.*, 496 U.S. 72, 82 (1990) (to "encourage" employees to report safety violations and protect their reporting activity); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985) ("Narrow" or "hypertechnical" interpretations are to be avoided as undermining Congressional purposes.); *Passaic Valley Sewerage Comm. v. Dep't of Labor*, 992 F.2d 474, 479 (3d Cir. 1993). This Court similarly construes Title VII to further its remedial purpose. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982).

The First Circuit panel majority dismissed the broad remedial purpose of Sarbanes-Oxley, stating

that it would not apply the "rule of lenity." "[T]he rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal." *Liparota v. United States*, 471 U.S. 419, 427, 105 S. Ct. 2084, 2089, 85 L. Ed. 2d 434 (1985).

The First Circuit confuses rules that protect criminal defendants from the rules for civil remedial statutes. In so doing, the First Circuit turns the construction of Sarbanes-Oxley from the policy of preventing corporate fraud into a policy of protecting employers who retaliate against those who report it. Broad construction of employee protections is not dependent on the rule of lenity used in criminal cases. Because the rule of lenity does not apply, the First Circuit should have, as Judge Thompson stated in his dissent, "default[ed] to breadth and reject[ed] narrowness." *Lawson v. FMR LLC*, 670 F.3d 61, 89 (1st Cir. 2012), *cert. granted*, 133 S. Ct. 2387 (U.S. 2013). Instead, the First Circuit construed the statute narrowly, defeating its remedial purpose.

a. ARB Adjudications Should Be Afforded *Chevron* Deference To The Extent That The Department of Labor Is Clarifying The Statute Through Its Active Adjudication Of Cases Under SOX And Where The Department of Labor Is Explaining How Its Decision Is Furthering The Law's Remedial Purpose.

The Department of Labor's Administrative Review Board ("ARB") has ruled that Section 806's protections extend to employees of a public

company's private contractors, subcontractors, and agents. In doing so, the Department of Labor is fulfilling its congressionally intended role of adjudicating administrative complaints of whistleblower retaliation. 18 U.S.C. § 1514A(b).

For example, the ARB exercised appropriate adjudicative authority in *Spinner v. David Landau and Associates*, LLC, 2012 WL 2073374 (ARB May 31, 2012), where it rejected the First Circuit's holding below. The ARB stated:

> First, we are obliged to interpret Section 806 broadly both because it is a remedial statute and the legislative history encourages us to do so. Second, we note that although the theoretical coverage of employees of any contractors, subcontractors, or agents of public companies might be broad, Section 806 contains built-in limitations including (1) its specific criteria for employees to have a reasonable belief of violations of specific anti-fraud laws or SEC regulations and (2) its requirement that the protected activity was a causal factor in the alleged retaliation.

Id. at 13 (internal citation omitted).

In *Spinner*, the ARB also noted that it has "repeatedly interpreted Section 806 as affording whistleblower protection to employees of contractors, subcontractors, or agents of publicly traded

companies, regardless of the fact that the contractor, subcontractor, or agent was not itself a publicly traded company. *See Charles v. Profit Inv. Mgmt.*, ARB No. 10-071, ALJ No. 2009-SOX-040 (ARB Dec. 16, 2011); *Funke v. Federal Express Corp*, ARB No. 09-004, ALJ No. 2007-SOX-043 (ARB July 8, 2011); *Johnson v. Siemens Building Techs.*, ARB No. 08-032, ALJ No. 2005-SOX-015 (ARB Mar. 31, 2011)."

This Court affords deference to agency interpretations as expressed in formal adjudications. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Under *Chevron*, when faced with an ambiguous statute which Congress has vested an agency with the power to interpret, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* At 843; *see also*, *FCC v. Fox Television*, 556 U.S. 502, 514-15, 129 S. Ct. 1800, 1810-11 (2009) (no heightened standard for agencies when changing policy).

In *United States v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001), the Supreme Court recognized that "express congressional authorizations to engage in the process of ... adjudication that produces ... rulings for which deference is claimed," is "a very good indicator of delegation meriting *Chevron* treatment...." *Id.* at 229, 121 S. Ct. 2164. The Court further explained that "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal

administrative procedure," including formal adjudication. *Id.* at 230 & n. 12, 121 S. Ct. 2164.

Courts of appeals have also recognized the appropriateness of affording the Department of Labor deference. Applying *Mead*, the Fourth Circuit held that the ARB's interpretation of Section 806 warranted *Chevron* deference based on this statutory and administrative delegation. *See Welch v. Chao*, 536 F.3d 269, 276 & n. 2 (4th Cir. 2008). The Third and Tenth Circuits recently reached the same conclusions. *See Wiest v. Lynch*, 710 F.3d 121, 131 (3d Cir. 2013); *Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dep't of Labor*, 11-9524, 2013 WL 2398691 (10th Cir. June 4, 2013).

Thus, it is appropriate for this Court to defer to the Department of Labor in extending Section 806 protections to employees of a public company's private contractors, subcontractors, and agents.

b. The Cramped Interpretation of Sarbanes-Oxley In The Pre-2008 Period, Contributed To The Economic Crisis of 2008.

In his May 21, 2012 article, *Sarbanes-Oxley's Whistleblower Provisions—Ten Years Later*[3], Professor Richard Moberly explores the effectiveness of Sarbanes-Oxley as a deterrent to unethical behavior in the corporate world. Professor Moberly posits that in the early 2000s, the Department of Labor and federal court system resisted enforcing

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[3] Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. Rev. 1 (2012).

Sarbanes-Oxley, leading to the "Great Recession" of the late 2000s. He specifically points to the Occupational Safety and Health Administration's ("OSHA") "inability to effectively enforce Sarbanes-Oxley's antiretaliation provision and...***narrow and restrictive interpretations***" of Sarbanes-Oxley as potential causes for the economic crisis.[4]

The recent economic crisis began when banks and other lenders made subprime mortgages to borrowers who were unlikely to repay them. Lenders then bundled the mortgages and sold them as "mortgage backed securities." Lenders used fraudulent practices to sell subprime loans and persuade regulators that the borrowers were qualified for these loans. As the borrowers, unsurprisingly, began to default, the value of the mortgage backed securities dropped, bankrupting companies that invested in or guaranteed them.

In his May 2012 article, Professor Moberly explains that whistleblowers did not play a significant role in exposing the behavior that led to the financial crisis in 2008. He states, "[t]he financial crisis in 2008 provides the most vivid case study of [Sarbanes-Oxley's] failure, as corporate officers, government regulators, and law enforcement agencies ignored the warnings of employees to who tried to report problems in the sub-prime mortgage industry."[5] Professor Moberly postulates that although whistleblowers had greater

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4 *Id.* at 32 (emphasis added).

5 *Id.* at 4.

protection than ever before, they lacked any confidence that the protections would actually work.

This lack of confidence in the ability of Sarbanes-Oxley was a result the failure of the Department of Labor and court system to enforce Sarbanes-Oxley. Professor Moberly states, "Unfortunately, even if Sarbanes-Oxley encouraged employees to report more frequently, the Act often failed to protect them from reprisals and failed to compensate them consistently from the retaliation they suffered."[6]

In spite of Sarbanes-Oxley's favorable burden of proof, OSHA refused to apply that burden in the claimants' favor in the years immediately preceding the "Great Recession." In fact, in 2007, OSHA's Investigative Manual did not even reflect the burden shifting framework in an accurate manner.[7]

Professor Moberly's 2007 study also reviewed the OALJ and ARB's application of Sarbanes-Oxley.

> ALJs often narrowed the scope of Sarbanes-Oxley's "protected conduct" to the detriment of employees. The ARB later enshrined the ALJs' restrictive approach by determining that whistleblowers had to "definitively and specifically" connect

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[6] *Id.* at 27.

[7] Richard Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 Wm. & Mary L. Rev. 65, 125 (2007).

> their disclosure to one of the six listed illegalities. Additionally, instead of protecting whistleblowers who disclose any of six different types of fraud, as listed in the statute, the ARB determined that the fraud reported must be fraud "related to shareholders" and "of the type that would be adverse to investors' interests." Further, the fraud had to be "material," as defined by securities laws to mean "information that a reasonable investor would consider important in deciding how to vote."[8]

This resistance by the Department of Labor and the federal court system has led potential whistleblowers to believe that they will have no recourse against retaliation by their employers. Without this confidence, Sarbanes-Oxley cannot fulfill its intended role of fraud prevention. Situations like Enron and the "Great Recession" are the natural consequence.

c. A Broad Application Of Sarbanes-Oxley to Contractors And Subcontractors Of Mutual Fund Holding Companies Will Help To Prevent A Similar Catastrophe In Mutual Fund Industry.

Excluding the employees of contractors and subcontractors of public companies from Section 806's protections could result in a disaster in the

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[8] Moberly, *Ten Years Later*, *supra* note 3 at 32-33 (internal citations omitted).

mutual fund industry, similar to that in the banking industry in 2008. Investment companies, including all mutual funds, are covered by Section 806. However, mutual funds typically do not have employees, relying instead on third party contractors, such as investment advisers. *See Jones v. Harris Associates L.P.*, 559 U.S. 335, 338, 130 S. Ct. 1418, 1422, 176 L. Ed. 2d 265 (2010) ("A separate entity called an investment adviser creates the mutual fund, which may have no employees of its own.") (citations omitted); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536, 104 S. Ct. 831, 838, 78 L. Ed. 2d 645 (1984) ("Unlike most corporations, [a mutual fund] is typically created and managed by a pre-existing external organization known as an investment adviser.") (citation omitted).

The employees of a mutual fund's contractors therefore have knowledge about the publicly-traded mutual fund's operations. These employees are particularly well-situated to recognize fraud and have direct knowledge of whether the funds they manage are complying with SEC requirements designed to prevent violations and shareholder fraud. Outside accountants and auditors, such as those at Arthur Andersen during the Enron scandal, also fall into this category. Leaving these employees without the protections of Section 806 violates the clear Congressional intent to address the wrongs brought to light from Enron and Arthur Anderson and could lead to a similar disaster in the mutual fund industry.

One avenue to avoiding such a catastrophe in the mutual fund industry is to protect internal

reporting. The United States Chamber of Commerce publicly recognized internal reporting as its preferred method of whistleblowing and fraud detection. The Chamber made these comments to the U.S. Securities and Exchange Commission on implementation of section 21F of the Securities Exchange Act in December of 2010 (pp. 3-4):

> Effective compliance programs rely heavily on internal reporting of potential violations of law and corporate policy to identify instances of non-compliance. These internal reporting mechanisms are cornerstones of effective compliance processes because they permit companies to discover instances of potential wrongdoing, to investigate the underlying facts, and to take remedial actions, including voluntary disclosures to relevant authorities, as the circumstances may warrant... Moreover, if the effectiveness of corporate compliance programs in identifying potential wrongdoing is undermined, their attendant benefits, such as promotion of a culture of compliance within corporations, as well as their value to enforcement efforts, will likewise be diminished.[9]

However, under the First Circuit's decision, such reporting by contractors and subcontractors

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[9] Full text of the Chamber's comments can be found at http:// www.sec.grov/comments/s7-33-10/s73310-110.pdf.

would fall outside of Sarbanes-Oxley's scope of protection. The financial crisis of 2008 serves as a stark example of the consequences of withholding this protection.

CONCLUSION

The plain text and legislative history of Section 806 of the Sarbanes-Oxley Act demonstrates that it protects employees of a public company's private contractor, subcontractor, or agent from retaliation. The Department of Labor has statutory responsibility to adjudicate such claims, and its holdings are entitled to *Chevron* deference. Further, the remedial nature of Sarbanes-Oxley calls for a broad and inclusive application of the term "employee." A narrow construction would undermine the act and leave many employees who are in a position to expose corporate fraud without whistleblower protection.

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AMICUS CURIAE BRIEF

No. 12-3

In the
SUPREME COURT OF THE UNITED STATES

JACKIE HOSANG LAWSON and
JONATHAN M. ZANG
Petitioners,
v.
FMR LLC, *et al.*
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL WHISTLEBLOWER CENTER IN SUPPORT OF THE PETITIONERS

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TABLE OF CONTENTS

Table of Authorities.....ii

Statement of Interest.....1

Summary of Argument.....2

Reasons for Granting Petition.....3

I. Protecting the employees of contractors is mandated under the plain meaning of the SOX whistleblower statute. 3

II. The conflict between *Spinner* and the First Circuit will discourage whistleblowers. 7

Conclusion.....7

TABLE OF AUTHORITIES

Federal Cases

Beck v. Prupis, 529 U.S. 494 (2000).....1

Brown & Root v. Donovan, 747 F.2d 1029 (5th Cir. 1984).....7

CBOCS West, Inc. v. Humphries, 533 U.S. 422, 128 S. Ct. 1951 (2008).....5

Doe v. Chao, 540 U.S. 614 (2004).....1

EEOC v. Waffle House, Inc., 534 U.S. 279 (2002).....1

English v. General Electric, 496 U.S. 72 (1990).....1

Gomez-Perez v. Potter, 553 U.S. 474 (2008).....5

Haddle v. Garrison, 525 U.S. 121 (1991).....1

Jackson v. Birmingham Board of Education, 544 U.S. 167 (2005).....5

NLRB v. Scrivener, 405 U.S. 117 (1972).....4

Passaic Valley Sewerage Comm. v. Dep't of Labor, 992 F.2d 474, 479 (3rd Cir. 1993)...4

Spinner v. David Landau and Associates, LLC, 2012 WL 2073374 (ARB May 31, 2012).....7

Vermont Agency of Nat. Resources v. U.S. ex. rel. Stevens, 529 U.S. 765 (2000).....1

Willy v. Administrative Review Bd., 423 F.3d 483, 489, n. 11 (5th Cir. 2005).....7

Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 397 (1982).....4

Federal Statutes

18 U.S.C. § 1514A(a).....2, 3

18 U.S.C. § 1514A(b).....6

STATEMENT OF INTEREST OF THE NATIONAL WHISTLEBLOWER CENTER

The National Whistleblower Center (Center)[1] is a nonprofit, tax-exempt, non-partisan, charitable, and educational organization dedicated to the protection of employees who "blow the whistle" and report misconduct in the workplace. The NWC lists its activities at www.whistleblowers.org.

As part of its core mission, the NWC regularly monitors major legal developments in whistleblower law, and files "Friend of the Court" briefs in federal and state courts and administrative agencies. Since 1990, the Center has participated before this Court as amicus curiae in cases that directly impact the rights of whistleblowers, including, *English v. General Electric,* 496 U.S. 72 (1990); *Haddle v. Garrison,* 525 U.S. 121 (1999); *Vermont Agency of Nat. Resources v. U.S. ex rel. Stevens,* 529 U.S. 765 (2000); *Beck v. Prupis,* 529 U.S. 494 (2000); *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002), and *Doe v. Chao,* 540 U.S. 614 (2004).

Persons assisted by the Center have a direct interest in the outcome of this case. The Sarbanes-Oxley Act (SOX) is a key piece of legislation to ensure that our financial markets are stable and that financial reports filed with the Securities and

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1 Pursuant to Rule 37.6, the Center states that counsel of record for all parties received over ten (10) days notice of intention to file this brief, and gave consent to the filing of this brief. Those consents are lodged herewith. No monetary contributions were accepted for the preparation or submission of this amicus curiae brief and that its counsel authored this brief in its entirety.

Exchange Commission (SEC) are reliable. The NWC played an important role in working with Congress, on a bi-partisan basis, to ensure that whistleblower protections were incorporated into the SOX. Ref. S. Rep. 107-146, at 10.

Whistleblowers who report wrongdoing by corporate officers frequently are subject to reprisals. It cannot be over-stated how vital are the avenues of legal redress, including rights available under SOX. Even under the best of circumstances, whistleblowers run enormous risks and suffer retaliation for reporting wrongdoing. If SOX does not provide adequate remedies, then whistleblowers face even greater disincentives to expose misconduct or violations of law.

SUMMARY OF ARGUMENT

The plain text of the Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514A(a), prohibits the contractors of public companies from retaliating:

> No company *** or any officer, employee, contractor, subcontractor, or agent of such company ***, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee ***.

Congress enacted the employee protection in SOX as a "crucial" component of a comprehensive plan to protect our economy from crises caused by

frauds. S. Rep. 107-146 at 2.

To deny protection to Jackie Lawson and Jonathan Zang, the First Circuit undermined established principals of statutory interpretation to reach a result inconsistent with the plain meaning of SOX.

REASONS FOR GRANTING THE PETITION

I. PROTECTING THE EMPLOYEES OF CONTRACTORS IS MANDATED UNDER THE PLAIN MEANING OF THE SOX WHISTLEBLOWER STATUTE.

Congress created the SOX whistleblower protection, 18 U.S.C. § 1514A(a), to address

> a culture, supported by law, that discourage[s] employees from reporting fraudulent behavior not only to the proper authorities . . . but even internally. This 'corporate code of silence' not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity.

S. Rep. No. 107-146, at 5 (2002). Congress considered the whistleblower protection to be a "crucial" component of SOX for "restoring trust in the financial markets by ensuring that corporate fraud and greed may be better detected, prevented and prosecuted." S. Rep. 107-146 at 2.

The plain text of this statute includes "contractors" among those prohibited from discharging emp-

loyees on account of lawful disclosures about frauds and other violations of securities rules. When a contractor fires its own employee for engaging in protected activity, it has violated the text of SOX. Publicly traded companies can now evade the employee protection simply by channeling compliance sensitive work to a contractor in the First Circuit.

To reach its tortured construction of SOX, the panel majority below had to reject the historic broad construction of whistleblower protections. Petition. pp. 34a-35a. Previously, courts have had no difficulty holding that whistleblower provisions must be given broad scope to accomplish their remedial purposes. *NLRB v. Scrivener* (1972), 405 US 117, 121-26; *English v. General Elec. Co.*, 496 U.S. 72, 82 (1990)(to "encourage" employees to report safety violations and protect their reporting activity); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985)("Narrow" or "hypertechnical" interpretations are to be avoided as undermining Congressional purposes.); *Passaic Valley Sewerage Comm. v. Dep't of Labor*, 992 F.2d 474, 479 (3rd Cir. 1993). This Court construes Title VII to further its remedial purpose. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982). Broad construction of employee protections is not dependent on the rule of lenity used in criminal cases. Ref. Petition, p. 36a

Indeed, the public interest in protecting employees from reprisals is so strong that this Court has imputed a protection into laws that have no words creating it. *Jackson v. Birmingham Board of Edu-*

cation, 544 U.S. 167 (2005) (Title IX); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 128 S. Ct. 1951 (2008) (42 U.S.C. § 1981); *Gomez-Perez v. Potter*, 553 U.S. 474 (2008) (ADEA).

The United States Chamber of Commerce recognizes internal reporting as its preferred method of whistleblowing and fraud detection. Such reporting is within SOX's scope of protection, and is denied to the employees of contractors in the First Circuit. The Chamber made these comments to the SEC on implementation of section 21F of the Securities Exchange Act in December of 2010 (pp. 3-4):

> Effective compliance programs rely heavily on internal reporting of potential violations of law and corporate policy to identify instances of non-compliance. These internal reporting mechanisms are cornerstones of effective compliance processes because they permit companies to discover instances of potential wrongdoing, to investigate the underlying facts, and to take remedial actions, including voluntary disclosures to relevant authorities, as the circumstances may warrant... Moreover, if the effectiveness of corporate compliance programs in identifying potential wrongdoing is undermined, their attendant benefits, such as promotion of a culture of compliance within corporations, as well as their value to enforcement efforts, will likewise be dimin-

ished.[2]

The SOX whistleblower provision explicitly protects internal whistleblowing. As Congress recognized, these internal protections for whistleblowers are necessary both for direct corporate employees, and employees who provide those services through contractor-vendors. Employees of contractors need SOX's legal protection to feel safe in their careers as they submit concerns to these "cornerstone" internal compliance programs. If left standing, the decision below will have a chilling effect detrimental to SOX's objective of increasing accountability.

The panel majority also rejected the explicit policies of the Department of Labor and SEC. Petition, pp. 46a-51a. This rejection invites further inconsistency and uncertainty that undermines the encouragement employees need to come forward.

II. THE CONFLICT BETWEEN *SPINNER* AND THE FIRST CIRCUIT WILL DISCOURAGE WHISTLEBLOWERS.

In *Spinner v. David Landau and Associates, LLC*, 2012 WL 2073374 (ARB May 31, 2012), Petition, pp. 161a-199a, the Department of Labor rejected the First Circuit's holding below. SOX gives the Department responsibility to adjudicate administrative complaints of whistleblower retaliation. 18 U.S.C. § 1514A(b).

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2 Full text of the Chamber's comments can be found at http://www.sec.gov/comments/s7-33-10/s73310-110.pdf

Whistleblower advocates have not seen such a conflict between a circuit court of appeals and the Department since the Fifth Circuit refused to protect nuclear whistleblowers raising safety concerns internally. *Brown & Root v. Donovan*, 747 F.2d 1029 (5th Cir. 1984). No other circuit followed this holding. In 1992, Congress amended the Energy Reorganization Act (ERA) to protect internal whistleblowing explicitly. In 2005, the Fifth Circuit finally conceded that its 1984 holding "was incorrect." *Willy v. Administrative Review Bd.*, 423 F.3d 483, 489, n. 11 (5th Cir. 2005).

Twenty-one years is too long to wait for correction of the decision below. Untold financial scandals would grow unnecessarily large while employees were discouraged from raising concerns.

CONCLUSION

The National Whistleblowers Center asks this Court to grant this petition and reverse the decision of the First Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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BRIEF OF AMICUS CURIAE NATIONAL WHISTLEBLOWER CENTER IN SUPPORT OF THE PETITIONERS

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TABLE OF CONTENTS

Table of Authorities..... ii

Statement of Interest..... 1

Summary of the Argument..... 2

Argument..... 3

Conclusion..... 7

TABLE OF AUTHORITIES

FEDERAL CASES

Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843 (1984)..... 3, 6, 7

Hill et al. v. Tennessee Valley Authority, 87-ERA-23/24 (July 24, 1991).....4

Spinner v. David Landau & Assocs. LLC, 2010-SOX-029 (May 31, 2012)..... 5, 9

St. Laurent v. Britz, Inc., 89-ERA-15, (Oct. 26, 1992)...4

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FEDERAL STATUTES AND REGULATIONS

Clean Air Act, 42 U.S.C. §7622..... 4

DOL Whistleblower Regulations, 29 C.F.R. Part 24 (1990).....6

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Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. §42121..... 2, 5, 4
Sarbanes-Oxley Act, 18 U.S.C. §1514A(b)(1)(B).....

Water Pollution Control Act, 33 U.S.C. §1367...2, 3

LEGISLATIVE DOCUMENTS

S. Rep. No. 107-146 (2002).....3, 6

STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Whistleblower Center (NWC)[1] is a nonprofit, non-partisan, tax-exempt, charitable, and educational organization dedicated to the protection of employees who report misconduct in the workplace. *See*, Web Site of the National Whistleblowers Center hosted at www.whistleblowers.org.

As part of its core mission, the NWC regularly monitors major legal developments in whistleblower law, and files "Friend of the Court" briefs in federal and state courts and administrative agencies. Since 1990, the Center has participated before this Court as *amicus curiae* in cases that directly impact the rights of whistleblowers, including, *English v. General Electric*, 496 U.S. 72 (1990); *Haddle v. Garrison*, 525 U.S. 121 (1999); *Vermont Agency of Nat. Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000); *Beck v. Prupis*, 529 U.S. 494 (2000); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), and *Doe v. Chao*, 540 U.S. 614 (2004).

Persons assisted by the NWC have a direct interest in the outcome of this case. The Sarbanes-

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[1] Pursuant to Rule 37.6, the Center states that counsel of record for all parties received over ten (10) days notice of intention to file this brief, and gave consent to the filing of this brief. Those consents are lodged herewith. No monetary contributions were accepted for the preparation or submission of this amicus curiae brief, and that the NWC's counsel authored this brief in its entirety.

Oxley Act's whistleblower protection provisions ("SOX") legislation that ensures our financial markets are stable and that financial reports filed with the Securities and Exchange Commission ("SEC") are reliable. The NWC played an important role in working with Congress, on a bi-partisan basis, to ensure that whistleblower protections were incorporated into the SOX. S. REP. NO. 107-146, at 10 (2002). As the Senate recognized when enacting section 806 of the Sarbanes-Oxley Act, whistleblower protections are key to effective enforcement of our nation's securities laws. ("...often, in complex fraud prosecutions, [whistleblowers] are the only firsthand witnesses to fraud"). S. REP. NO. 107-146, at 10 (2002).

SUMMARY OF THE ARGUMENT

Congress did not draft the substantive provisions of the Sarbanes-Oxley Act's whistleblower provisions in a vacuum. They were modeled on the 1971 Federal Water Pollution Control Act, the 1978 Energy Reorganization Act and other similar laws based on these precedents, including the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"). The meaning of the term "employee" as used by Congress in the SOX should be consistent with the use of that term in laws upon which the SOX was modeled.

Congress vested exclusive authority in the Secretary of Labor ("SOL") to administer these whistleblower provisions. Employees cannot file a claim in federal court under SOX unless the SOL fails to comply with Congress' statutory deadline for

issuing final decisions. Within the context of this authority, the Secretary has consistently interpreted the term "employee" broadly in order to encompass contractors and sub-contractors. This interpretation has been in place for decades, and has not once been challenged by Congress or overturned by any court. Under the principle of deference to the determinations of administrative agencies outlined in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, this Court must give due deference to the Secretary of Labor's determination that the term "employee," applies contractors and sub-contractors.

If the Court were to do otherwise, and decide that Sarbanes-Oxley's whistleblower provisions do not extend protections to contractors and sub-contractors in the financial services industry, it would create a massive loophole that was not intended by Congress when SOX was passed. Such a holding would create dubious incentives for corporations engaged in misconduct to hire contractors and sub-contractors to handle some of their more legally questionable work. This is what Enron did back in the early 2000s, and it was the Enron debacle that sparked the enactment of SOX and its anti-retaliation provision. S. REP. NO. 107-146, at 4, 5 (2002).

ARGUMENT

UNDER *CHEVRON* THE COURT MUST DEFER TTHE SECRETARY OF LABOR'S FINDING THAT THE TERM "EMPLOYEE" APPLIES BROADLY TO INCLUDE CONTRACTORS AND SUB-CONTRACTORS

SOX was modeled on a series of whistleblower laws that created a statutory remedy prohibiting retaliation on an industry-by-industry basis. The substantive and procedural framework of SOX mirrors these prior laws. *See, e.g.*, the Water Pollution Control Act, 33 U.S.C. §1367, the Energy Reorganization Act of 1974, *as amended* ("ERA"), 42 U.S.C. § 5851, the AIR21 49 U.S.C. §42121, and the Clean Air Act 42 U.S.C. §7622. Congress incorporated by reference numerous provisions of AIR21 directly into the SOX whistleblower law, and in its legislative history pointed to case precedent from the Federal Water Pollution Control Act as a guide to interpreting a key provision of the Act. S. REP. NO. 107-146, at 19 (2002).

Like SOX, these numerous laws also included the term "employee" in the definition of who was covered under the Act, and also like SOX, these laws failed to define the term "employee."

Under the laws upon which SOX was based, the Department of Labor's interpretation of the term "employee" has been consistent for over twenty-five years, and has not been challenged by a Court or questioned in Congress. The Secretary has consistently interpreted the term "employee" to include contractors and sub-contractors in order to ensure that the anti-retaliation provisions enacted by Congress were not thwarted by an employer's classification of persons it utilized to provide services for which it needed. *See, e.g. Hill et al. v. Tennessee Valley Authority*, 87-ERA-23/24 (July 24, 1991) ("Section 5851(a) of the ERA provides that '[n]o

employer...may discharge any employee or otherwise discriminate against any employee...' (Emphasis added). It is not limited in terms to discharges or discrimination against any specific employer's employees"). *St. Laurent v. Britz, Inc.*, 89-ERA-15 (Oct. 26, 1992).

Following the passage of the Sarbanes-Oxley Act, several Department of Labor cases concerned with coverage of employees of contractors came before the Secretary of Labor. In *Welch v. Cardinal Bankshares Corporation*, the Secretary of Labor ruled that the Sarbanes-Oxley's whistleblower provisions are similar to those of other whistleblower protections, and as Section 806 of the Sarbanes-Oxley Act is a new provision. precedent from cases arising under previous federal whistleblower statutes should be incorporated in examining the situation at hand. The Secretary of Labor also draws attention to an interim final rule stating that the Sarbanes-Oxley Act should be implemented in the same manner as previous whistleblower protection provisions, most notably the ERA and AIR21. 2003-SOX-15, footnote 91 (Jan. 28, 2004).

The Secretary of Labor, through the Administrative Review Board, applied its long-standing law on this issue to a case arising under the SOX. *Spinner v. David Landau & Assocs. LLC*, 2010-SOX-029 (May 31, 2012). In that decision, the majority and concurring opinions set forth an extremely well reasoned and detailed analysis of the Secretary's longstanding interpretation of the term "employee" as used in the whistleblower laws administered by the Labor Department. The holding

in. *Spinner*, finding that contractors are covered under SOX, is entitled to *Chevron* deference.[2]

It was clearly Congress' intent to vest *Chevron* deference with the Secretary of Labor. First, like the laws upon which SOX was based, all complaints must be filed with the Secretary, and cannot be filed directly in federal court. Second, the Secretary is required to conduct an investigation that can lead to a final enforceable order. Third, if the results of an investigation are appealed, the Department of Labor is required to conduct a hearing and issue a final enforceable order. This structure is nearly identical to the investigatory and adjudicatory structure of SOX's sister laws.

SOX carved out one narrow exception to the exclusive jurisdiction of the Department of Labor. If the DOL failed to issue a final enforceable order within 180 days, an employee could remove his or her case to federal court for a *de novo* hearing. This optional right may only be exercised by an employee, and only if the Department of Labor fails to issue a timely final order. 18 U.S.C. §1514A(b)(1)(B).[3]

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[2] The rule in *Chevron* is well settled. Courts are required to give deference to interpretations of law by administrative agencies in situations where "the statute is silent or ambiguous with respect to the specific issue," and in such a case "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984).

[3] The early versions of the DOL-administered anti-retaliation laws vested exclusive jurisdiction in the Department of Labor to adjudicate the claims and issue final determinations. *See* 29 C.F.R. Part 24 (1990). Under these laws the DOL was required to issue final orders within 90 days. However, the DOL rarely

CONCLUSION

Under *Chevron*, the Secretary's holding that contractors and subcontractors are covered under the term "employee" in SOX and the related whistleblower laws is entitled to deference.

Respectfully submitted,

/s/

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followed this requirement, and many cases languished for years. To remedy this procedural problem, Congress, in the SOX, created a hybrid adjudication process. Congress doubled the amount of time it required the DOL to issue final orders (increasing the time limit from 90 to 180 days), but also included a remedy for employees, if the DOL failed to meet this deadline. If a case languished for over 180 days with the administrative agency, the employee could opt out of the DOL, and file a claim *de novo* in federal court. This process was not designed to strip the DOL of exclusive jurisdiction over SOX cases. Indeed, cases were required to be filed within the DOL, and if the DOL completed the case within the statutory time-frame, an employee could not file a claim in federal district court.

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JOINT APPENDIX

RECORD
AND
BRIEFS

No. 12-3

FILED
AUG 1 6 2013
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JACKIE HOSANG LAWSON and JONATHAN M. ZANG,

Petitioners,

v.

FMR LLC, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

JOINT APPENDIX

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Petition For Certiorari Filed June 28, 2012
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TABLE OF CONTENTS

Page

Relevant Docket Entries, *Lawson v. FMR LLC et al.*, United States District Court, District of Massachusetts, No. 1:08-cv-10466-DPW 1

Relevant Docket Entries, *Zang v. Fidelity Management & Research Company et al.*, United States District Court, District of Massachusetts, No. 1:08-cv-10758-DPW 4

Relevant Docket Entries, *Lawson v. FMR LLC*, United States Court of Appeals for the First Circuit, No. 10-1944 8

Relevant Docket Entries, *Lawson v. FMR Co., Inc.*, United States Court of Appeals for the First Circuit, No. 10-2240 9

Lawson v. FMR LLC, et al., United States District Court, District of Massachusetts, No. 1:08-cv-10466-DPW, Amended Complaint and Demand for Jury Trial (Filed September 19, 2008) 11

Zang v. Fidelity Management & Research Company, et al., United States District Court, District of Massachusetts, No. 1:08-cv-10758-DPW, Complaint and Demand for Jury Trial (Filed May 6, 2008) 62

Zang v. Fidelity Management & Research Company, et al., United States District Court, District of Massachusetts, No. 1:08-cv-10758-DPW, Exhibit B to Complaint (Filed May 6, 2008) 93

TABLE OF CONTENTS – Continued

Page

Zang v. Fidelity Management & Research Company, et al., United States District Court, District of Massachusetts (Boston), Case No. 1:08-cv-10758-DPW, Affidavit of Ethan Davis, Exhibit 3 (Filed June 6, 2008) 140

Zang v. Fidelity Management & Research Company, et al., United States District Court, District of Massachusetts (Boston), Case No. 1:08-cv-10758-DPW, Affidavit of Ethan Davis, Exhibit 6 (Filed June 6, 2008) 151

The following opinions, orders, and decisions have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Memorandum and Order of the District Court for the District of Massachusetts, March 31, 2010 .....76a

Opinion of the Court of Appeals for the First Circuit, February 3, 2012 .....1a

Order of the Court of Appeals for the First Circuit Denying Rehearing, April 6, 2012 .....134a

Lawson v. FMR LLC et al
United States District Court
District of Massachusetts (Boston)
CIVIL DOCKET FOR CASE #: 1:08-cv-10466-DPW

03/20/2008	1	COMPLAINT against FMR LLC, FMR Corp., Fidelity Brokerage Services, LLC Filing fee: $ 350, receipt number 0101000000001895401, filed by Jackie Hosang Lawson. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Civil Cover Sheet, # 7 Category sheet)(Talwani, Indira) Modified text on 3/21/2008 (Seelye, Terri). (Entered: 03/20/2008)
09/19/2008	22	Amended Complaint with jury demand filed by plaintiff. (Attachments: # 1 Table of Contents, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3 Part 1, # 5 Exhibit 3 Part 2, # 6 Exhibit 4, # 7 Exhibit 5, # 8 Exhibit 6, # 9 Exhibit 7, # 10 Exhibit 8, # 11 Exhibit 9, # 12 Exhibit 10)(Seelye, Terri) (Entered: 09/22/2008)
10/08/2008	24	First MOTION to Dismiss Plaintiff's Amended Complaint by FMR LLC, Fidelity Brokerage Services, LLC.(Scalia, Eugene) (Entered: 10/08/2008)
03/30/2010	43	Judge Douglas P. Woodlock: MEMORANDUM AND ORDER entered granting in part (as to Count II) and

		denying in part (as to Count I) 24 Motion to Dismiss (Woodlock, Douglas) (Entered: 03/30/2010)
04/12/2010	44	MOTION to Amend 43 Order on Motion to Dismiss (Defendants' Motion to Amend Order to Include Certification for Interlocutory Appeal and for Stay Pending Appeal). by FMR Corp., FMR LLC, Fidelity Brokerage Services, LLC.(Benoit, Wilfred) (Entered: 04/12/2010)
07/28/2010	55	Judge Douglas P. Woodlock: MEMORANDUM AND ORDER entered granting (44) Motion to Amend in case 1:08-cv-10466-DPW; and granting (46) Motion to Amend; granting (53) Motion for Leave to File Document in case 1:08-10758. Accordingly, pursuant to 28 U.S.C. § 1292(b), I hereby CERTIFY the following controlling question of law for appellate review:Does the whistleblower protection afforded by Section 806(a) of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, apply to an employee of a contractor or subcontractor of a public company, when that employee reports activity which he or she reasonably believes may constitute a violation of 18 U.S.C. §§ 1341, 1343, 1344, or 1348; any rule or regulation of the Securities and Exchange Commission; or any provision of Federal law and such a

		violation would relate to fraud against shareholders of the public company?And it is further ORDERED that, during the pendency of the appellate proceedings necessary to dispose of this certification, further action in these cases be STAYED in this Court, with the exception that the Defendants shall answer the complaint and the parties shall within 30 days of this Order exchange the mandatory initial disclosures contemplated by Federal Rule of Civil Procedure 26(a)(1) and Local Rule 26(2)(A). Associated Cases: 1:08-cv-10466-DPW, 1:08-cv-10758-DPW(Woodlock, Douglas) (Entered: 07/28/2010)
12/01/2010	60	Assented to MOTION to Unseal Document Amended Complaint and Demand for Jury Trial and Exhibits by FMR Corp., FMR LLC, Fidelity Brokerage Services, LLC.(Scalia, Eugene) (Entered: 12/01/2010)
12/07/2010		Judge Douglas P. Woodlock: ELECTRONIC ORDER entered granting 60 Motion to Unseal Document (York, Steve) (Entered: 12/07/2010)

Zang v. Fidelity Management &
Research Company et al.
United States District Court
District of Massachusetts (Boston)
CIVIL DOCKET FOR CASE #: 1:08-cv-10758-DPW

05/06/2008	1	COMPLAINT against all defendants, filed by Jonathan M. Zang. (Attachments: # 1 category sheet, # 2 Civil Cover Sheet, # 3 Exhibit A, # 4 Exhibit B, # 5 Exhibit C, # 6 Exhibit D, # 7 Exhibit E, # 8 Exhibit F, # 9 Exhibit G)(Gaudet, Jennifer) (Entered: 05/06/2008)
06/06/2008	11	AFFIDAVIT in Support re 9 MOTION to Dismiss and/or Remand (Affidavit of Ethan Z. Davis Regarding Nature and Scope of Department of Labor Proceedings in Support of Fidelity's Motion to Dismiss). (Attachments: # 1 Exhibit 3, # 2 Exhibit 4, # 3 Exhibit 5-A, # 4 Exhibit 5-B, # 5 Exhibit 5-C, # 6 Exhibit 5-D, # 7 Exhibit 5-E, # 8 Exhibit 5-F, # 9 Exhibit G, # 10 Exhibit H, # 11 Exhibit I, # 12 Exhibit 5-J, # 13 Exhibit 5-K, # 14 Exhibit 5-L, # 15 Exhibit 5-M, # 16 Exhibit 5-N, # 17 Exhibit 5-O, # 18 Exhibit 5-P, # 19 Exhibit 5-Q, # 20 Exhibit 5-R, # 21 Exhibit 5-S, # 22 Exhibit 5-T, # 23 Exhibit 5-U, # 24 Exhibit 5-V, # 25 Exhibit 5-W, # 26 Exhibit 5-X, # 27 Exhibit 5-Y, # 28 Exhibit 5-Z, # 29 Exhibit 5-AA, # 30 Exhibit 6, # 31 Exhibit 7, # 32 Exhibit 8)(Benoit, Wilfred) (Entered: 06/06/2008)

10/07/2008	25	MOTION to Dismiss and/or Remand by Fidelity Management & Research Company, FMR Co., Inc., FMR LLC.(Benoit, Wilfred) Modified text on 10/8/2008 (Lovett, Jarrett). (Entered: 10/07/2008)
03/30/2010	45	Judge Douglas P. Woodlock: MEMORANDUM AND ORDER entered granting in part (as to Count II) and denying in part (as to Count I) 25 Motion to Dismiss; denying 25 Motion to Remand; granting 29 Motion to Withdraw as Attorney. Attorney Alan D. Rose, Sr and Nicholas J. Rosenberg terminated; finding as moot 34 Motion to refer. (Woodlock, Douglas) (Entered: 03/30/2010)
04/12/2010	46	MOTION to Amend 45 Order on Motion to Dismiss, Order on Motion to Remand, Order on Motion to Withdraw as Attorney, Order on Motion for Miscellaneous Relief,,,, (Defendants' Motion to Amend Order to Include Certification for Interlocutory Appeal and for Stay Pending Appeal). by FMR Co., Inc., FMR LLC, Fidelity Management & Research Company.(Benoit, Wilfred) (Entered: 04/12/2010)
07/28/2010	54	Judge Douglas P. Woodlock: MEMORANDUM AND ORDER entered granting (44) Motion to Amend in

case 1:08-cv-10466-DPW; and granting (46) Motion to Amend; granting (53) Motion for Leave to File Document in case 1:08-10758. Accordingly, pursuant to 28 U.S.C. § 1292(b), I hereby CERTIFY the following controlling question of law for appellate review:Does the whistleblower protection afforded by Section 806(a) of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, apply to an employee of a contractor or subcontractor of a public company, when that employee reports activity which he or she reasonably believes may constitute a violation of 18 U.S.C. §§ 1341, 1343, 1344, or 1348; any rule or regulation of the Securities and Exchange Commission; or any provision of Federal law and such a violation would relate to fraud against shareholders of the public company?And it is further ORDERED that, during the pendency of the appellate proceedings necessary to dispose of this certification, further action in these cases be STAYED in this Court, with the exception that the Defendants shall answer the complaint and the parties shall within 30 days of this Order exchange the mandatory initial disclosures contemplated by Federal Rule of Civil Procedure 26(a)(1) and Local Rule 26(2)(A). Associated Cases: 1:08-cv-10466-DPW,

1:08-cv-10758-DPW(Woodlock, Douglas) (Entered: 07/28/2010)

United States Court of Appeals
for the First Circuit
Court of Appeals Docket #: 10-1944
Lawson v. FMR LLC

08/09/2010	MISCELLANEOUS CASE filed by Petitioners FMR Co., Inc., FMR Corporation, FMR LLC, Fidelity Brokerage Services, Inc. and Fidelity Management & Research Company. Appearance form due 08/24/2010. [10-1944] – [Edited 08/10/2010 by TS]. CLERK'S NOTE: Docket entry was edited to modify the file date. (TS)
08/23/2010	CROSS-PETITION for permission to appeal filed by Respondent Jackie Hosang Lawson. Certificate of service dated 08/23/2010. [10-1944] (IT)
08/23/2010	CROSS-PETITION for permission to appeal filed by Respondent Jonathan M. Zang. Certificate of service dated 08/23/2010. [10-1944] (JMZ)
10/25/2010	JUDGMENT granting cross-petition filed by Respondent Jackie Hosang Lawson, granting cross-petition filed by Respondent Jonathan M. Zang entered by Juan R. Torruella, Appellate Judge; Kermit V. Lipez, Appellate Judge and Rogeriee Thompson, Appellate Judge. 10-1944 Granted [10-1944] (TS)

United States Court of Appeals
for the First Circuit
Court of Appeals Docket #: 10-2240
Lawson v. FMR Co., Inc.
Appeal From: District of Massachusetts, Boston

10/25/2010	CIVIL CASE docketed. Notice of appeal filed by Appellants/Cross-Appellees FMR Co., Inc., FMR Co., Inc., FMR Corporation, FMR LLC, Fidelity Brokerage Services, Inc. and Fidelity Management & Research Company. Docketing Statement, Transcript Report/Order form, Appearance form, and Fee due 11/08/2010. [10-2240] – [Edited 10/25/2010 by TS]. CLERK'S NOTE: Docket entry was edited to replace an attachment. (TS)
02/03/2012	OPINION issued by Sandra L. Lynch, Chief Appellate Judge; Jeffrey R. Howard, Appellate Judge and Rogeriee Thompson, Appellate Judge. Published. [10-2240] (AH)
02/03/2012	JUDGMENT entered by Sandra L. Lynch, Chief Appellate Judge; Jeffrey R. Howard, Appellate Judge and Rogeriee Thompson, Appellate Judge. 10-2240 Remanded [10-2240] (AH)
02/17/2012	PETITION for rehearing and rehearing en banc filed by Appellee/ Cross-Appellant Jackie Hosang Lawson. Certificate of service dated 02/17/2012. [10-2240] (IT)

02/19/2012	PETITION for rehearing and rehearing en banc filed by Appellee/ Cross-Appellant Jonathan M. Zang. Certificate of service dated 02/19/2012. [10-2240] (JMZ)
02/22/2012	ORDER entered by Sandra L. Lynch, Chief Appellate Judge. Plaintiff-appellee/cross-appellant Jonathan M. Zang's motion to file the petition for rehearing and rehearing en banc one day late is allowed. [10-2240] (AH)
04/06/2012	ORDER entered by Sandra L. Lynch, Chief Appellate Judge; Juan R. Torruella, Appellate Judge; Michael Boudin, Appellate Judge; Jeffrey R. Howard, Appellate Judge and Rogeriee Thompson, Appellate Judge denying petition for panel rehearing/rehearing enbanc filed by Appellee/Cross-Appellant Jonathan M. Zang and Appellee/Cross-Appellant Jackie Hosang Lawson. [10-2240] (AH)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JACKIE HOSANG LAWSON, Plaintiff, vs. FMR LLC, dba FIDELITY INVESTMENTS; FMR CORP., dba FIDELITY INVESTMENTS; and FIDELITY BROKERAGE SERVICES, LLC, dba FIDELITY INVESTMENTS, Defendants.	No. 1:08-cv-10466 DPW (Filed under seal)*

AMENDED COMPLAINT and DEMAND FOR JURY TRIAL

(Filed Sep. 19, 2008)

INTRODUCTION

This action is brought against FMR Corp., its successor, FMR LLC, and their subsidiary, Fidelity Brokerage Services, LLC. These Defendants operate under the trade name and are referred to herein as "Fidelity Investments." The action is brought under Section 806 of the Corporate and Criminal Fraud Accountability Act, Sarbanes-Oxley Act of 2002, 18

* Motion to unseal document granted by the district court on December 7, 2010.

U.S.C. § 1514A(a)(1) and Massachusetts common law prohibiting wrongful discharge against public policy.

Fidelity Investments holds itself out as the world's largest mutual fund company, investing billions in the assets of others. Fidelity Investments simultaneously guards against scrutiny of its business practices, requiring its employees to sign confidentiality agreements purporting to preclude all disclosures of Fidelity Investments' internal information, without exception for disclosures to government agencies, and claiming that the federal government has no jurisdiction to investigate claims of retaliation filed by employee whistleblowers who report suspected wrongdoing to their supervisors or to the Securities and Exchange Commission or other government agencies.

This action involves retaliation taken against a long-term, exemplary employee, Jackie Hosang Lawson, a Senior Director of Finance at Fidelity Investments, after she expressed concerns regarding matters that she reasonably believed constituted a violation of rules or regulations of the Security and Exchange Commission or Federal law relating to fraud against shareholders of Fidelity mutual funds. While still employed by Fidelity Investments, Ms. Lawson brought her concerns to her managers, to Fidelity Investments' then-General Counsel, to other in-house attorneys, and eventually to the Securities and Exchange Commission. Fidelity Investments responded by embarking on a campaign to discredit, harass and intimidate Ms. Lawson.

Ms. Lawson filed claims regarding the retaliation with the Occupational Safety and Health Administration ("OSHA"), the federal agency within the Department of Labor charged with enforcing the whistleblower protections of the Sarbanes-Oxley Act. In response, Fidelity Investments continued the retaliation, and claimed that its employees are not protected by the Sarbanes-Oxley whistleblower provisions. When the federal agency advised Fidelity Investments that it was proceeding to investigate Ms. Lawson's factual allegations, Ms. Lawson's supervisors escalated their harassment of her while Fidelity Investments simultaneously attempted to derail the federal agency's efforts to investigate Ms. Lawson's claims. Denied access to the prompt protection the law requires, and subjected to unendurable working conditions, Ms. Lawson eventually was compelled to resign her position at Fidelity Investments.

This action in federal court is of import not only to Ms. Lawson, but to other Fidelity Investments employees and to the millions of Americans with money invested in Fidelity Mutual Funds. Ms. Lawson's reputation within Fidelity Investments was of a person with great integrity and dedication. She raised her concerns only through proper channels, including to her supervisors and other managers with authority to address these matters, Fidelity's Office of General Counsel, and the Securities and Exchange Commission. Her supervisors' gross mistreatment of Ms. Lawson once she raised concerns regarding potential fraud on shareholders was clearly evident to her

co-workers. Ms. Lawson brings this suit not only to address her own injury, but also to obtain a declaration that Fidelity Investments is an employer covered by Sarbanes-Oxley's anti-retaliation provisions, so that Fidelity Investments' supervisors cannot continue to intimidate employees by asserting that they have no protection from retaliation for reporting potential violations of rules and regulations of the Securities and Exchange Commission or Federal law relating to shareholders.

VENUE

1. Venue is proper in the District of Massachusetts under 28 U.S.C. § 1391(b). This is a civil action wherein jurisdiction is not founded solely on diversity of citizenship and a substantial part of the events or omissions giving rise to Plaintiff's claim occurred in this District.

JURISDICTION

2. Jurisdiction over Plaintiff's federal claim is proper in the District of Massachusetts under 28 U.S.C. § 1331 and 18 U.S.C. § 1514A(b)(1)(B) because Plaintiff filed a complaint with the Secretary of Labor under 18 U.S.C. § 1514(b)(1)(A), and the Secretary of Labor has not issued a final decision within 180 days of the filing of the complaint, and there is no showing that such delay is due to the bad faith of the Plaintiff. Jurisdiction over Plaintiff's state claim is proper under 28 U.S.C. § 1367(a).

PARTIES

3. Defendant FMR LLC is a limited liability company organized under the laws of Delaware and registered to do business in the Commonwealth of Massachusetts in the general character of "parent company." Its principal office in Massachusetts is at 82 Devonshire Street, Boston, MA 02109. FMR LLC is the survivor and merger of Defendant FMR Corp. FMR LLC conducts business under the name "Fidelity Investments."

4. Defendant FMR Corp. is a Delaware corporation and, until recently, was registered to do business in the Commonwealth of Massachusetts in the general character of "parent company of Fidelity subsidiaries" and with its principal offices in Massachusetts located at 82 Devonshire Street, Boston, MA 02109. FMR Corp. conducted business under the name "Fidelity Investments" until its merger into FMR LLC. FMR Corp. is no longer registered to do business in the Commonwealth of Massachusetts.

5. Defendant Fidelity Brokerage Services, LLC is a limited liability company organized under the laws of Delaware, and registered to do business in the Commonwealth of Massachusetts in the general character of "investments." Its principal office in Massachusetts is at 82 Devonshire Street, Boston, MA 02109. Fidelity Brokerage Services, LLC conducts business under the name "Fidelity Investments." Fidelity Brokerage Services, LLC's sole member is Fidelity Global Brokerage Group, Inc., a Massachusetts

corporation, with a business in the general character of "investments" and a principal office in Massachusetts at 82 Devonshire Street, Boston, MA 02109. Fidelity Global Brokerage Group, Inc., is a wholly owned subsidiary of FMR Corp. and/or FMR LLC.

6. Plaintiff Jackie Hosang Lawson is a former employee of FMR Corp. and/or its subsidiary Fidelity Brokerage Services, LLC. Ms. Lawson is a resident of Brookline, Massachusetts.

ALLEGATIONS REGARDING THE APPLICABILITY OF THE SARBANES-OXLEY WHISTLEBLOWER PROVISIONS TO THESE DEFENDANTS

7. The Fidelity family of mutual funds are investment companies under the Investment Company Act of 1940, 15 U.S.C. § 80a-3(a)(1) and are required to file reports under section 15(d) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78o(d). The Fidelity mutual funds, however, have no employees. They have been and are currently overseen by a single Fidelity Mutual Funds Board of Trustees.

8. Fidelity Management & Research Co. is a Massachusetts corporation with a principal office in Massachusetts at 82 Devonshire Street, Boston, MA 02109. Fidelity Management & Research Co. is a wholly owned subsidiary of FMR Corp. and/or FMR LLC. Fidelity Management & Research Co. is a registered investment advisor under 15 U.S.C. § 80b-2(a)(11) and serves as the registered investment

advisor to Fidelity Mutual Funds. By law, Fidelity Management & Research Co. may only provide services through a written contract that specifies the services to be performed and the fees to be paid and that is approved by the Fidelity Mutual Funds Board of Trustees.

9. On information and belief, in order to comply with federal law, the Fidelity Mutual Funds Board of Trustees reviews and approves the Investment Advisory Contracts and other contracts and/or subcontracts with Fidelity Management & Research Co., FMR Corp., FMR LLC and/or other companies owned in whole or in part by FMR Corp. and/or FMR LLC.

9.1 On information and belief, the contracts reviewed by the Board of Trustees of Fidelity Mutual Funds include contracts for Management Fees and Transfer Agent Fees.

10. On information and belief, prior to approving these contracts and/or subcontracts, the Fidelity Mutual Funds Board of Trustees reviews financial data and methodologies to determine fund profitability provided to it by FMR Corp. or FMR LLC and/or their subsidiaries, including Fidelity Management & Research Co., Fidelity Global Brokerage Group, Inc., and Fidelity Brokerage Services, LLC.

10.1 On information and belief, one of the key analytics that the Fidelity Mutual Funds Board depends on to make its determination on whether to renew its existing contracts for Management Fees and Transfer Agent Fees, or to negotiate a reduction

in fees, is FMR Co.'s annual Profit & Loss statements. The accuracy of the profit margins for Fund Profitability and Transfer Agent set forth in these statements is critical. If the reported margins are high, the Mutual Fund Board will typically negotiate to lower the fees paid to Fidelity; if the reported margins are low or have relatively low variance year over year, the Mutual Fund Board will typically maintain the existing fee structure. Hence, any understatement of Fidelity's profit margins could potentially result in Fidelity earning unwarranted fees, to the detriment of Fidelity Mutual Funds shareholders.

10.2 Under section 36(b) of the Investment Company Act of 1940 as amended, 15 U.S.C. § 80a-35(b), FMR Co. is deemed to have a fiduciary duty with respect to the receipt of compensation for services, or of payments of a material nature, paid to it by the Fidelity Mutual Funds.

10.3 Under section 15 of the Investment Company Act of 1940 as amended, 15 U.S.C. § 80a-15, FMR Co. may not act as the investment advisor to the Fidelity Mutual Funds except pursuant to a written contract with the Fidelity Mutual Funds which has been approved by a vote of the majority of independent directors of the Fidelity Mutual Fund Board of Trustees. Section 15(c) of the Investment Company Act of 1940 as amended, 15 U.S.C. § 801-15(c), requires further that FMR Co. must furnish to the Fidelity Mutual Funds Board of Trustees such information as may reasonably be necessary to evaluate the terms of the investment advisor contract. Under

Section 15(c) and rules and regulations of the Securities and Exchange Commission, similar disclosure is required for contracts with affiliates of the investment advisor and principal underwriters.

10.3 [sic] Rules and regulations of the Securities and Exchange Commission mandate disclosure to shareholders of the Fidelity Mutual Funds of material factors and conclusions regarding those factors that form the basis of the Fidelity Mutual Funds Board of Trustees' recommendation for the Board's basis for approval of investment advisory contracts.

10.4 [sic] The Annual Reports to the Shareholders of the Fidelity Funds are filed with the Securities and Exchange Commission pursuant to Section 30(b)(2) of the Investment Company Act as amended, 15 U.S.C. § 80a-30(b)(2), and Section 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(d). The Annual Report of the Fidelity Puritan Fund contains a section entitled "Board Approval of Investment Advisory Contracts and Management Fees." One subsection is entitled "Cost of the Services and Profitability." In that subsection, the Annual Reports states:

> The Board considered the revenues earned and the expenses incurred by Fidelity in conducting the business of developing, marketing, distributing, managing, administering and servicing the fund and its shareholders. The Board also considered the level of Fidelity's profits in respect of all the Fidelity funds.

On an annual basis, FMR presents to the Board Fidelity's profitability for the fund. Fidelity calculates the profitability for each fund, as well as aggregate profitability for groups of Fidelity funds and all Fidelity funds, using a series of detailed revenue and cost allocation methodologies which originate with the audited books and records of Fidelity. The Audit Committee of the Board reviews any significant changes from the prior year's methodologies.

PricewaterhouseCoopers LLP (PwC), independent registered accounting firm and auditor to Fidelity and certain Fidelity funds, has been engaged annually by the Board as part of the Board's assessment of the results of Fidelity's profitability analysis. PwC's engagement includes the review and assessment of Fidelity's methodologies used in determining the revenues and expenses attributable to Fidelity's mutual fund business, and completion of agreed-upon procedures surrounding the mathematical accuracy of fund profitability and its conformity to allocation methodologies. After considering PwC's reports issued under the engagement and information provided by Fidelity, the Board believes that while other allocation methods may also be reasonable, Fidelity's profitability methodologies are reasonable in all material respects.

The Board has also reviewed Fidelity's non-fund businesses and any fall-out benefits related to the mutual fund business as well as

> cases where Fidelity's affiliates may benefit from or be related the [sic] fund's business.
>
> The Board considered the costs of the services provided by and the profits realized by Fidelity in connection with the operation of the fund and determined that the amount of profit is a fair entrepreneurial profit for the management of the fund.

On information and belief, the Annual Reports for all Fidelity mutual funds contains similar disclosures.

10.5 [sic] The Statement of Additional Information of Fidelity Puritan Funds was also filed with the Securities and Exchange Commission and was incorporated by reference into the Fund's prospectus. That Statement contains a section entitled "Management Services" that provides:

> Under the terms of its management contract with each fund, FMR acts as investment adviser and, subject to the supervision of the Board of Trustees, has overall responsibility for directing the investments of the fund in accordance with its investment objective, policies and limitations. FMR also provides each fund with all necessary office facilities and personnel for servicing the fund's investments, compensates all officers of each fund and all Trustes [sic] who are interested persons of the trusts or of FMR, and all personnel of each fund or FMR performing services relating to research, statistical and investment activities.

> In addition, FMR or its affiliates, subject to the supervision of the Board of Trustees, provide the management and administrative services necessary for the operation of each fund. These services including providing facilities for maintaining each fund's organization; supervising relations with custodians, transfer and pricing agents, accountants, underwriters and other persons dealing with each fund; preparing all general shareholder communications and conducting shareholder relations; maintaining each fund's records and the registration of each fund's shares under federal securities laws and making necessary filings under state securities laws; developing management and shareholder services for each fund; and furnishing reports, evaluations and analyses on a variety of subject [sic] to the Trustees.

On information and belief, similar disclosure is contained in the Statements of Additional Information for all of the Fidelity Funds.

11. Plaintiff's whistle-blowing activities relate primarily to the accuracy of the information on fund profitability provided to the Fidelity Mutual Funds Board of Trustees, as detailed below.

12. FMR Corp., FMR LLC and/or their subsidiaries, including Fidelity Management & Research Co., Fidelity Global Brokerage Group, Inc., and Fidelity Brokerage Services, LLC. are contractors and/or subcontractors of the Fidelity mutual funds. As contractors and/or subcontractors of companies

required to file reports under section 15(d) of the Securities Exchange Act, Defendants are prohibited under 18 U.S.C. § 1514A from taking actions against their employees for whistle-blowing activity relating to potential fraud against the shareholders of Fidelity mutual funds.

13. Defendants FMR Corp. or FMR LLC and their subsidiaries, including Fidelity Global Brokerage Group, Inc., Fidelity Brokerage Services, LLC and Fidelity Management Research Co., also are sufficiently related as an integrated employer to constitute a single entity for purposes of coverage and liability under Sarbanes-Oxley. Defendants are referred to collectively herein as "Fidelity Investments."

ALLEGATIONS REGARDING MS. LAWSON'S EXHAUSTION OF ADMINISTRATIVE REMEDIES

14. On December 20, 2006, Ms. Lawson filed her first complaint under Section 806 of the Corporate and Criminal Fraud Accountability Act, Sarbanes-Oxley Act of 2002, 18 U.S.C. §, 1514A with OSHA. The Complaint was docketed by OSHA as Case Number 1-0120-07-005. A copy of this Complaint is attached hereto as Exhibit 1.

15. On or about February 26, 2007, Fidelity Investments submitted its response. The response sought dismissal of the complaint, claiming that employees of Fidelity Investments are not entitled to

whistleblower protections because Fidelity Investments is privately held.

16. On April 24, 2007, Ms. Lawson filed her second complaint under Section 806 of the Corporate and Criminal Fraud Accountability Act, Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A with OSHA. The Complaint was originally docketed by OSHA as Case Number 1-0120-07-0008, (but was later added to amended Case Number 1-0120-07-005). A copy of this Complaint is attached hereto as Exhibit 2.

17. On or about August 27, 2007, the OSHA investigator assigned to Ms. Lawson's case advised both parties that OSHA was rejecting Fidelity Investments' claim that it was not subject to the Sarbanes Oxley whistleblower provisions and that OSHA intended to proceed to investigate the merits of Ms. Lawson's complaint.

18. On or about September 15, 2007, Ms. Lawson filed her third complaint under Section 806 of the Corporate and Criminal Fraud Accountability Act, Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A with OSHA. The Complaint was originally docketed by OSHA as Case Number 1-0120-07-012 (but was later added to amended Case Number 1-0120-07-005). A copy of this Complaint is attached hereto as Exhibit 3.

19. On November 9, 2007, Ms. Lawson filed her fourth complaint against Fidelity Investments under Section 806 of the Corporate and Criminal Fraud Accountability Act, Sarbanes-Oxley Act of 2002, 18

U.S.C. § 1514A with OSHA. The Complaint was docketed as Case Number 1-0120-08-001 (but was later added to amended Case Number 1-0120-07-005). A copy of this complaint (but excluding its attachments) is attached hereto as Exhibit 4.

20. On or about November 26, 2007, Ms. Lawson's counsel received notice from the Associate Solicitor, Division of Fair Labor Standards, United States Department of Labor, that Fidelity Investments had been in contact with his office regarding Ms. Lawson's Sarbanes-Oxley complaint. Ms. Lawson's counsel subsequently was provided copies of two letters submitted on Fidelity Investments behalf by its outside counsel in an effort to stop OSHA's investigation of Ms. Lawson's complaint. The first letter, dated September 13, 2007, was addressed to the head of the Office of the Whistleblower Protection Program at the Occupational Safety and Health Administration, and references an August 30, 2007 telephone conversation between Fidelity Investments' outside counsel and the head of the Office of the Whistleblower Protection Program. The second letter, dated November 1, 2007, was addressed to the head of the Office of the Whistleblower Protection Program at the Occupational Safety and Health Administration, the Associate Solicitor, Fair Labor Standards, Office of the Solicitor of Labor, and the Counsel for Whistleblower Programs, Office of the Solicitor of Labor, and referenced an October 19, 2007 meeting between the addressees and Fidelity Investments' outside counsel.

21. On December 20, 2007, Ms. Lawson submitted to the Associate Solicitor, Division of Fair Labor Standards, United States Department of Labor, her response to Fidelity Investment's letters. Ms. Lawson's response is attached hereto as Exhibit 5.

22. On January 3, 2008, Ms. Lawson gave notice, pursuant to 29 C.F.R. § 1980.114(b) of her intention to file an action in the United States District Court for the District of Massachusetts in her first two cases, Case No. 1-0120-07-005 and Case No. 1-0120-07-008. A copy of this notice is attached hereto as Exhibit 6.

23. On January 28, 2008, Ms. Lawson received notice from OSHA consolidating her four complaints under the original complaint number, and stating further that the Complaint, as amended, was closed due to her election to proceed in Federal Court. A copy of this notice is attached hereto as Exhibit 7.

ALLEGATIONS CONCERNING MS. LAWSON'S EMPLOYMENT WITH FIDELITY INVESTMENTS, HER PROTECTED ACTIVITY AND FIDELITY INVESTMENTS' RETALIATION

Background Facts

24. Ms. Lawson began her employment with Fidelity Investments in 1993, working as a contract employee in various positions until 1996 when she became a regular Fidelity Investments full-time employee. Throughout her employment, from 1993

through the termination of employment in 2007, Ms. Lawson received weekly or monthly paychecks from FMR Corp.

25. Ms. Lawson's career at Fidelity Investments was successful until the events at issue here which began in 2005. In 1999, she was promoted to the position of Director of Finance, and in 2001 to the position of Senior Director of Finance.

26. Prior to August 2004, the three main companies within Fidelity Brokerage Services, LLP (Personal Investments or "PI", National Financial or "NF", and Registered Investment Advisors or "RIA") each performed its own fund profitability calculations and each worked directly with FMR Co., and Fidelity Investments' outside auditor, PwC, to report fund profitability to the Fidelity Mutual Funds Board of Trustees.

27. In May 2004, Ms. Lawson was asked by her manager to review the current models being used by two of these businesses (NF and RIA) for Fund Profitability analysis. It is her further understanding that she was selected to perform this review because the models were based on the principles of "Activity Based Costing," an area where Ms. Lawson has considerable expertise. Ms. Lawson's performance review through June 2004 reflects her efforts to understand and rectify issues in these Fund Profitability models, and the willingness and support of the Chief Financial Officers for NF and RIA to have her do so. Her merit review for the period July 1, 2003 through June

30, 2004 gives her an overall rating of "Exceeds Expectations." The Overall Comments state that:

> "Jackie is a subject matter expert and viewed as such by everyone. She's committed to producing quality work and is passionate about doing the right thing for business and putting Fidelity first. She is forward thinking, innovative and always looking to learn and improve. She has demonstrated leadership with her staff and her finance peers. Jackie excels at fixing problems. She has recently demonstrated this yet again by taking it upon herself to understand [Fund Profitability], what was wrong with it and what's needed to be done to fix it. The NF and RIA businesses are thrilled and appreciative that she is leading this effort. Jackie has solicited help from CFIT and has developed a project plan which she will lead in order to fix FP."

28. In August 2004, a new group called "Shared Services" was formed to provide information for the NF, RIA and PI companies to the Board of Trustees of the Fidelity Mutual Funds.

29. Fidelity Investments first offered the Head of Board Support position to another candidate who prior to the formation of the FBC Shared Services group held that position for the PI company. On information and belief, this candidate declined because she believed there were too many problems with the PI Fund Profitability model.

30. In August 2004, Fidelity Investments appointed Ms. Lawson as Head of the Board Support Group.

31. One of Ms. Lawson's first tasks as Head of Board Support was to rebuild the Fund Profitability models for NF and RIA. Ms. Lawson's bonus review for the period January 1, 2004 through December 31, 2004, gives her an overall rating of "Exceeds Expectations" reflecting her work on these models. The Overall Comments given by her new manager state that:

> "Jackie is very well-respected among her peers and business partners, has an extremely strong work ethic, and can be depended on to get results. She has a lot of knowledge about Fidelity and finance, and shows her concern for both the firm and its people. She is a strong manager who is well-liked and well-respected by the analysts in her group, and she puts a lot of work into developing her people and looking out for their best interests. She is an excellent role model for analysts as well as directors in terms of management, leadership and commitment to achieving results. She is very focused on working collaboratively and building strong relationships with our business partners, whether it is business unit finance, FMR Co. finance or PWC. Jackie is very comfortable presenting to Sr. Mgt. I very much enjoy working with Jackie and look forward to continuing our strong relationship and helping her achieve success in 2005."

31.1 Also in 2004, Fidelity Investments began offering a new initiative, called "Guidance Interactions," to give investment advice to the public. Fidelity Investments advertised the activity as free of charge, and consistent with that representation, prior to 2005, this expense was allocated as 100% Sales/ Distribution activity and not considered an expense charged to existing shareholders.

Ms. Lawson's Spring 2005 Protected Activity (Reporting of the Switch of Source System Without Knowledge or Approval of the Fidelity Board of Trustees)

32. Beginning Spring 2005, Ms. Lawson began raising concerns regarding certain actions by the PI group. The details regarding Ms. Lawson's initial concerns are set forth in Ms. Lawson's Complaint filed with OSHA on December 20, 2006, as Case Number 1-0120-07-005, (attached hereto as Exhibit 1) and Part II of her reply of May 14, 2007, to Fidelity Investments' redacted February 26, 2007 Response (attached hereto as Exhibit 8). Ms. Lawson raised these concerns with her immediate manager, his manager (the Senior Vice President for Shared Services, Harris Komishane), as well as then CFO of PI Finance (Jean Raymond) and PI Finance Vice President John Cahill.

32.1 During PwC's annual audit of the 2005 Fund Profitability Cycle, PwC detected certain discrepancies. These discrepancies involved a large year

over year variance for expenses for one mutual fund, Fidelity Cash Reserves. Ms. Lawson and her team determined that the large year over year variances were attributable to faulty allocations by a new source system implemented by PI Finance. Ms. Lawson and her team determined that PI Finance had switched to this new source system without proper review, and that the new source system did not provide comparable data to the old source system. Ms. Lawson and her group also determined that PI Finance had not disclosed this switch of source systems or obtained approval of PwC or FMR Co. beforehand. The absence of disclosure or approval by PwC or FMR Co. beforehand also meant that the switch of source systems had been done without the knowledge or approval of the Fidelity Mutual Funds Board of Trustees or its audit committee.

32.2 Ms. Lawson believed that switching the source systems without the knowledge or approval of the Fidelity Mutual Funds Board of Trustees was in violation of SEC rules and regulations or federal laws concerning fraud against shareholders. This belief was reasonable. The Fidelity Board of Trustees required that refinement and changes to the methodologies used to determine profitability be reported to the Fidelity Board of Trustees or its Audit Committee. In the absence of such reporting of changes in methodology, the financial statements provided to the Fidelity Mutual Funds Board of Directors are misleading and/or inaccurate, and may result in improper fees being paid by the Fidelity mutual funds to the

Fidelity companies at the expense of shareholders, and may result in improper filings with the SEC and incorrect notices to shareholders.

32.3 In March 2005, Ms. Lawson first advised her then-manager, Michael Freeman, his manager, Senior Vice President Harris Komishane, then-CFO of PI Finance Jean Raymond and PI Finance Vice President John Cahill that she had learned that the discrepancy had resulted from PI Finance's use of a new source system, and that that switch by PI Finance to the new source system had not been disclosed or approved by PwC or FMR Co. She subsequently presented her findings at a meeting attended by Jean Raymond, Harris Komishane, Michael Freeman, and representatives from FMR Co. (J.S. Wynant and John Farinacci) and PwC (including Dave Trerice and Nick Sylvester).

Fidelity Managers' Initial Responses to Ms. Lawson's Spring 2005 Protected Activity

33. Ms. Lawson succeeded in having these first concerns addressed by Fidelity Investments, and she received excellent verbal and written feedback concerning her work from FMR Co., PwC and the Chief Financial Officers for NF and CFO. The "Overall Comments" in Ms. Lawson's merit review for the period July 1, 2004 through June 30, 2005 performance review by her manager reflect this assessment of Ms. Lawson's work:

"In the past year Jackie has been placed in a new role managing Board Support for all of FBC. Jackie had never before been in a role where she was required to perform analysis of the Board of Trustees, so being asked to manage a group of analysts who performed this work without having done it herself was a big challenge. Jackie met this challenge by achieving excellent results for both FP and TA. The feedback that we received from PwC and FMR Co. was that the analysis provided by her group was the best of any business unit, after having been the worst in the prior year, before our group existed. A survey my manager conducted showed that all FBC b/u's [business units] and FMR Co. rated the work provided by Jackie's group in the Annual FP [Fund Profitability] cycle very highly. Jackie consistently put in an outstanding effort in all aspects of her role in the past year, working many long nights and weekends. She has learned a significant amount about Fund Profitability and the Transfer Agent process, and has been an excellent manager of her group. She has made significant improvements to the FP and TA processes for both RIA and NF, one of the key wins from having this work performed in Shared Services.

Her commitment and effort are consistently at the highest level."

34. In raising her concerns of the PI Fund Profitability methodologies previously used by the PI finance group, however, Ms. Lawson incurred the

hostility and subsequent retaliatory actions of PI Finance. Despite the Overall Comments given by her manager, she was given an Overall Rating of "Proficient," rather than "Exceed Expectations" or "Outstanding." On information and belief, this lower rating was based on the unwarranted negative feedback from the CFO for PI Finance, Jean Raymond.

34.1 On information and belief, following the March 2005 meeting, PI Finance CFO Jean Raymond also asked that Ms. Lawson be removed from her position.

Ms. Lawson's Summer 2005 Protected Activity (Reporting on PI Finance's Failure to Implement Methodology Approved by the Board of Trustees for Allocation of Internet Expenses)

35. From June 2005 through October 2005, Ms. Lawson's Group reviewed additional PI fund profitability methodologies, and Ms. Lawson raised additional concerns to her managers (including Harris Komishane), to the then PI Finance CFO (Jean Raymond), to PwC and to FMR Co. These concerns are detailed in Ms. Lawson's Complaint filed with OSHA on December 20, 2006, as Case Number 1-0120-07-005 (and attached hereto as Exhibit 2), and in Part II of her reply of May 14, 2007, to Fidelity Investments' redacted February 26, 2007 Response (attached hereto as Exhibit 8).

35.1 In the summer of 2005, Ms. Lawson and her team questioned PI Finance's allocation of internet

expenses. After research, Ms. Lawson and her group determined that a new methodology for the allocation of internet expenses had been approved by the Mutual Funds Board in November 2003. Ms. Lawson determined further that although the Board had approved the new methodology for allocation of internet expenses in November 2003, as of the summer of 2005, PI Finance had still failed to implement the methodology approved by the Board, and had failed to advise FMR Co. or PwC that it was not following the approved methodology. Ms. Lawson reasonably believed that failing to implement the methodology approved by the Board of Trustees, without notice or approval, was in violation of SEC rules and regulations or federal laws concerning fraud against shareholders.

35.2 Ms. Lawson, her then-supervisor Michael Freeman, and an analyst who reported to Ms. Lawson presented the analysis to Senior Vice President Harris Komishane and to then Vice President of PI Finance John Cahill. On information and belief, Mr. Freeman also presented Ms. Lawson's analysis to the then-PI Finance CFO Jean Raymond and Vice President of PI Finance Richard Lyons.

Fidelity Managers' Further Responses to Ms. Lawson's Protected Activity

35.3 Following the reporting of PI Finance's failure to implement the 2003 web methodology, a two-day meeting was held offsite to discuss "Roles and Responsibilities" between the groups in Shared

Services and the business finance teams. At the end of the two day meeting everyone was encouraged to post comments on different white boards in the section of their concern. PI Finance CFO Jean Raymond expressed her view that the Head of Board Support – the position then held by Ms. Lawson – "has too much control."

36. In October 2005, Ms. Lawson was asked by Harris Komishane to give up day to day management of the Board Support Group and to complete instead a long-term project. In February 2006, however, Ms. Lawson's immediate manager brought Ms. Lawson back into the Fund Profitability group because he needed her assistance to complete the annual 2006 Fund Profitability cycle.

36.1 During Ms. Lawson's absence from her responsibilities of day to day management of the Board Support Group, FMR presented the change to the methodology to the Fidelity Board of Trustees in November 2005 as part of the 2005 Semi-Annual Fund Profitability Review. When it did so, it failed to note that the change had actually been approved two years earlier and had not been implemented for two years.

Ms. Lawson's Initial (Spring and Summer 2006) Protected Activity Concerning the Back Office Group and the Phones/Call Centers Group

37. In May 2006, Ms. Lawson resumed her review of Fund Profitability methodologies. Ms.

Lawson became aware that during her absence from the Board Support Group, PI Finance had succeeded in obtaining her manager's authorization to have the Board Support Group implement certain methodologies out of cycle. Ms. Lawson raised concerns regarding the implementation and use of these methodologies to her manager, to Harris Komishane, to PwC and to a PI finance sub-committee formed to review all the PI methodologies.

37.1 One of the methodologies that had been implemented during Ms. Lawson's absence from the Board Support Group was applied to one PI Department, the PI Back Office group, which services shareholders' accounts. Ms. Lawson's group found that the new methodology had been implemented without review by FMR Co. or by the external auditors, PwC, and without any impact analysis or test of data or drivers for reasonableness and appropriateness. The 12b-1 reports for the first and second quarter of 2006 were created by the Board Support Group using information obtained from the methodology that was implemented in Ms. Lawson's absence. Ms. Lawson and her group found two major errors when the methodology was finally analyzed, resulting in additional expenses being allocated incorrectly to the Fidelity Mutual Funds. Although the errors were corrected by Ms. Lawson's group, the incorrect 12b-1 reporting for the first and second quarter of 2006 were not corrected. Ms. Lawson reported this failure to correct the 12b-1s to Senior Vice-President Harris Komishane.

37.2 In the summer of 2006, it also came to Ms. Lawson's attention that there was a significant year over year shift in the Phones/Call Centers Group's expenses from "Sales/Distribution" to Transfer Agent "Service." From the size of the shift, Ms. Lawson suspected that at least some of the shift was caused by erroneous data. Ms. Lawson and her group attempted to determine the reason for the shift.

38. From May 2006 through September 2006, the Board Support Group and the PI Finance subcommittee met bi-weekly to review the PI fund profitability methodologies.

38.1 Because of the complexity of the call content model, it took months to reproduce the results submitted by PI Finance. During this review, Ms. Lawson and her team discovered that the same type of phone call was not categorized consistently across multiple phone functions and that PI Finance could not provide documentation for the rationale/classification of the sale/service categorization of these calls. Ms. Lawson continued to raise her concerns regarding these methodologies during these biweekly meetings.

Fidelity Managers' Further Responses to Ms. Lawson's Protected Activity

38.2 As Ms. Lawson raised these concerns, her immediate manager supported her, but PI Finance management responded with hostility and began a course of action to prevent her concerns from being addressed.

39. In July 2006, Ms. Lawson received only a below average raise. In her oral review, her manager gave no explanation for the below average raise. Despite Fidelity Investments' policies mandating a written merit review, no such review was given to Ms. Lawson at the time.

39.1 Ms. Lawson was also denied Fidelity shares for that bonus cycle, even though her team won an award for the TA Framework project undertaken during this review period and even though the written review for the period that was eventually provided to Ms. Lawson accurately reports that "Jackie effectively led the [TA Framework] project, in which the control and documentation that never existed within [Fidelity Brokerage Service] were created. The team received accolades from PwC, Internal Audit, FMR Co., and [Fidelity Brokerage Services]."

Ms. Lawson's September 2006 Protected Activity Concerning the Phones/Call Center Group

39.2 In early September 2006, Ms. Lawson advised her immediate manager, Michael Freeman, that she and her group had identified a large shift in expenses from Distribution to Processing for the Phones/Call Center Group, and that PI Finance could not provide documentation for the rationale or classification of the categorization of each call. Ms. Lawson advised him further that the model being used by PI Finance to account for the expenses of the call centers appeared to be incorrect, and was resulting

in Fidelity allocating too much of the expense to its transfer agent activities as opposed to its distribution activities and thus making the transfer agent business appear less profitable than it actually was on the FMR Co. Profit and Loss statements. The incorrect accounting was important because the Board of Trustees of the Fidelity Mutual Funds relies on FMR Co.'s Profit & Loss statements in setting Fidelity's fees for serving as the transfer agent.

39.3 At a meeting in September attended by Ms. Lawson, her supervisor Michael Freeman relayed Ms. Lawson's concerns about the Call Content model being used by PI Finance to numerous other high level managers, including PI Finance Vice President Tim Rooney, who oversaw the finance group supporting the phone centers, in early September 2006, and PI CFO Richard Lyons.

Fidelity Managers' Further Response to Ms. Lawson's Protected Activity

39.4 At the September 2006 meeting, when Ms. Lawson's concerns with the PI Fund Profitability methodologies were relayed to him, PI Finance Vice President Tim Rooney responded during the meeting by yelling at Ms. Lawson.

40. In September 2006, Ms. Lawson's manager was notified that he would be transferred to another position. Once the manager was so notified, he turned responsibilities for the review of PI Fund Profitability to a PI Finance Director (Claire Cadogan), who

approved the implementation of the methodologies over Ms. Lawson's objections. Ms. Lawson's manager left the group in October, 2006, prior to completing Ms. Lawson's merit review.

40.1 Ms. Cadogan approved the methodology for the Phones/Call Center Group, falsely claiming that the Fidelity Transfer Agent contract allowed guidance expenses to be categorized as service expenses covered by the Transfer Agent contract.

41. When Ms. Lawson learned that her manager was being transferred, Ms. Lawson requested that she be considered for the position to be vacated by her manager. In response, the Senior Vice President for Shared Services Harris Komishane told Ms. Lawson that she had done a great job over the past two years, and had made tremendous improvements in the Board support group. He said that her performance was at a superior level and that her analytical skills were outstanding. Nonetheless, Claire Cadogan, who had overruled Ms. Lawson's concerns regarding PI Fund Profitability, who had no Board Support experience, and who had significantly less management experience, was placed in the position instead. Ms. Lawson was told by her manager that she was to train the PI Finance Director (Claire Cadogan) because Ms. Cadogan had no Board Support experience.

42. On September 21, 2006, Harris Komishane advised Ms. Lawson that Claire Cadogan would become the Director of the Board Support Group. When

Ms. Lawson pointed out conflicts of interest with the independence and governance of the Board Support group, Mr. Komishane told Ms. Lawson that Ms. Lawson was highly compensated. Ms. Lawson understood this statement as an implied threat that Ms. Lawson would lose that compensation if she raised further questions about this conflict of interest.

43. On information and belief, PI Finance insisted on placing Ms. Cadogan in her position as Director of Board Support to cover up Fund Profitability issues. The action was also taken in retaliation for Ms. Lawson having raised concerns regarding the PI Finance methodology.

44. On September 29, 2006, Ms. Lawson's attorney wrote to Fidelity Investments then-General Counsel Lena Goldberg, reporting Ms. Lawson's earlier concerns regarding the practices by PI Finance, and her concerns regarding the future independence of the Board Support Group following the assignment of Claire Cadogan, the former PI Finance Director, to head the Board Support Group. Through her attorney, Ms. Lawson also requested a transfer out of the Board Support Group. That request was denied.

44.1 A copy of Ms. Lawson's attorney's letter of September 29, 2006, is attached to the Complaint filed with OSHA on December 20, 2006, and attached hereto as part of Exhibit 1.

45. On October 9, 2006, the former PI Finance Director Claire Cadogan formally assumed the title of

Director of Board Support Group and Ms. Lawson was officially removed as the Head of the Board Support Group. Despite the change of title and removal of authority, Ms. Lawson continued to have full work responsibility for supervising the Board Support Group.

Ms. Lawson's October 2006 Protected Activity Concerning the Call Content Issue and Fidelity Managers' Response

46. Ms. Lawson expressed to her new supervisor her grave concerns regarding the Fund Profitability methodology that was implemented, and provided documentation detailing the problem. Instead of addressing the issues raised in this documentation, Claire Cadogan and other Fidelity Investments' managers continued their campaign to discredit Ms. Lawson.

47. This campaign was evident to Ms. Lawson's staff who reported to Ms. Lawson that her new manager came to the Board Support group "gunning" for Ms. Lawson.

47.1 At Fidelity's attorneys' request, Ms. Lawson met with them (without her own counsel present) regarding the concerns set forth in the September 2006 letter to Fidelity's general counsel. Claire Cadogan demanded to know the reason for her meeting with Fidelity's attorneys, and when she did not disclose the substance, Ms. Cadogan and Mr.

Komishane make [sic] unfounded accusations against Ms. Lawson for the purpose of discrediting her.

47.2 For example, Ms. Cadogan reported that PI Finance Vice President Tim Rooney had given unsolicited feedback that Ms. Lawson had failed to prepare business partners for their meeting with PwC. This allegation was false, as Ms. Lawson had in fact prepared each of the managers except one who opted against a prep meeting.

47.3 On December 6, 2006, Ms. Lawson again raised the call content issue in a meeting with Ms. Cadogan and the outside auditor, PwC. Ms. Cadogan declined to address the issue.

48. On December 7, 2006, Ms. Lawson's attorney again wrote to Fidelity Investments' attorneys regarding the ongoing operations and independence of the Board Support Group, to report Ms. Lawson's supervisors' unwarranted attempts to discredit Ms. Lawson, and to request again Ms. Lawson's immediate transfer out of her current position – where she could no longer support the methodologies being used – to an alternative position at Fidelity Investments.

48.1 A copy of Ms. Lawson's attorney's letter of December 7, 2006, to Fidelity's attorney is attached hereto as Exhibit 9

49. On December 11, 2006, after Fidelity Investments' attorneys received this letter, Ms. Lawson was provided copies of her most recent performance reviews. Among the documents provided was a

purported merit review for the July 1, 2005 through June 30, 2006 period by her former manager. The review had not been prepared in the normal course of business and had not previously been provided to Ms. Lawson, but instead was prepared months late, and without consulting with Ms. Lawson.

50. This review contained inaccurate statements regarding Ms. Lawson's performance. These inaccurate statements were made in retaliation for her raising concerns and in an effort to falsely discredit her.

51. On December 18, 2006, Ms. Lawson's supervisors retaliated against Ms. Lawson for raising concerns regarding the PI Finance methodologies by giving her a reduced bonus compensation.

Ms. Lawson's December 2006 and January 2007 Protected Activity (Filing a Sarbanes-Oxley Complaint With OSHA and Further Communications Regarding the Guidance Interaction)

51.1 On December 20, 2006, Ms. Lawson filed her first complaint under Section 806 of the Corporate and Criminal Fraud Accountability Act, Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A with OSHA, setting forth her claim that Fidelity had retaliated against her for her whistleblower activities. A copy of this complaint is attached hereto as Exhibit 1.

52. On December 20, 2006, Ms. Lawson, through her attorney, advised Fidelity Investments' then-General Counsel that Ms. Lawson had filed a retaliation claim with OSHA by providing a facsimile copy. On January 5, 2008, Ms. Lawson also advised the Securities and Exchange Commission of the filing by providing a copy of [the] Sarbanes-Oxley complaint filed with OSHA and the earlier letters to Fidelity Investments' counsel by mail and facsimile. On February 16, 2007, Ms. Lawson orally provided the Securities and Exchange Commission further information regarding the matters relating to potential fraud against Fidelity Mutual Funds shareholders.

53. On information and belief, on or about January 8, 2007, OSHA notified Fidelity Investments and the individuals named in Ms. Lawson's complaint, including Harris Komishane, Claire Cadogan, Jean Raymond and Tim Rooney, of the pending complaint.

53.1 In late December 2007, Ms. Lawson learned that the Phones/Call Centers Group had copied the methodology they were using from the PI Investor Center Group. Ms. Lawson learned further that the PI Investor Center Group had implemented this methodology in December 2005 at the direction of then PI CFO Jean Raymond. Under the methodology (being used by both the Phones/Call Centers Group and the PI Investor Center Group), guidance interaction expenses in amounts of over $100 million dollars were being incorrectly categorized as service

covered under the TA Contract, rather than as Distribution, which is not covered.

53.2 On January 4, 2007, Ms. Lawson met with one of the PI Investor Center Group offices, Fidelity's Congress Street Financial Representatives. Although Ms. Cadogan had been invited to this meeting, she declined to attend. From this meeting, Ms. Lawson determined that in fact the accounting for guidance interaction implemented by PI Finance in Ms. Lawson's absence from her role at the Board Support Group was incorrect. Ms. Lawson confirmed that all expenses related to guidance should be 100% Sales/Distribution (as it had been categorized in 2005), and not Transfer Agent service.

53.3 On information and belief, despite the shift of approximately $100 million from Sales/Distribution to Transfer Agent service expenses as a result of the methodology implemented by then PI CFO Jean Raymond, no disclosure was made to the Fidelity Mutual Funds Board of Trustees of the change in methodology.

54. During the week of January 8, 2007, Ms. Lawson contacted the Vice President of Board Support and Business Analysis at FMR Co. regarding the PI Fund Profitability methodology. Ms. Lawson took this action because she reasonably believed that the methodology resulted in inaccurate numbers being presented to the Fidelity Mutual Funds Board of Trustees, her attempts to have her supervisors and the General Counsel's office address the matter had

failed, and because the Vice President of Board Support and Board Analysis at FMR Co. was in a position to prevent the inaccurate reporting.

55.

56. On January 22, 2007, FMR Co. scheduled a meeting to review the PI Fund Profitability methodology question. The meeting attendees (by phone or in person) included: Ms. Lawson; Ms. Lawson's manager Claire Cadogan (who had approved the continuing use of the methodology over Ms. Lawson's concerns); Ms. Lawson's prior manager (who had approved the methodology during the period when Ms. Lawson was not involved in the day-to-day operations of the group); their manager, Senior Vice President for Shared Services Harris Komishane; the former PI Finance CFO Jean Raymond (who had originally requested the PI methodology, and (who by then served as Executive Vice President and Chief Financial Officer); the CFO for FMR Co.; the Vice President for Board Support and Business Analysis at FMR Co., external auditors from PwC; and Fidelity Investments' legal counsel.

57. Ms. Lawson presented her concerns at the meeting. When attempts were made by managers to delay review of the issue until later in the year, Ms. Lawson informed the attendees that she had filed a complaint with OSHA and that the SEC was also aware of her complaint. FMR Co. concluded the meeting with a mandate for a committee to be formed which was to include Ms. Lawson and PwC.

Fidelity Managers' Responses to Ms. Lawson's Protected Activity

57.1 When Claire Cadogan learned that Ms. Lawson had contacted FMR Co., she harshly berated Ms. Lawson for doing so, and also responded by increasing Ms. Lawson's workload and unfairly criticizing her performance.

58. Following the January 22, 2007 meeting, Ms. Lawson's manager Claire Cadogan announced that she was the chair of the Committee. Ms. Cadogan then excluded Ms. Lawson from all meetings of the committee. On January 26, 2007, four days after the meeting with FMR Co., Claire Cadogan gave Ms. Lawson a document entitled Performance Expectations in which Ms. Cadogan made the unfair criticism of Ms. Lawson a part of her employment record.

59. On January 29, Claire Cadogan retaliated against Ms. Lawson further by denying approval for Ms. Lawson's legitimate expense report.

60. Meanwhile, in January 2007, Claire Cadogan had asked Ms. Lawson to research a different issue. Ms. Cadogan informed Ms. Lawson that she and Harris Komishane had been aware of this issue since October 2006, and had been working with FMR Co. on the issue. Ms. Lawson determined that the issue was of concern, that the matter had not yet been brought to the attention of the Fidelity Mutual Funds Board, and that it had arisen in another Fidelity Company outside of Ms. Lawson's area of responsibility (and not part of Fidelity Brokerage Services,

LLC). Nonetheless, in March 2007 and April 2007, Claire Cadogan and Harris Komishane in a chain of e-mails tried to implicate Ms. Lawson in the potential fraud.

60.1 The issue raised by Ms. Cadogan related to the improper retention of 12b-1 fees by National Financial. Ms. Lawson's group had no prior knowledge and no reason to know of National Financial's improper retention of the 12b-1 fees.

Ms. Lawson's April 2007 Protected Activity (Filing a Second Sarbanes-Oxley Complaint with OSHA)

60.1 [sic] On April 24, 2007, Ms. Lawson filed her second complaint under Section 806 of the Corporate and Criminal Fraud Accountability Act, Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A with OSHA, alleging further retaliation for her protected activity.

61. Ms. Lawson is informed and believes that on or about May 9, 2007, OSHA notified Fidelity Investments, Claire Cadogan and Harris Komishane of the second OSHA complaint.

Ms. Lawson's May 2007 Protected Activity (Concerning the Retained 12b-1s, the FPI Marketing Fund Profitability Issue, and the Call Content/Guidance Interaction Issue) and Fidelity Managers' Response

62. On May 10, 2007, Ms. Lawson notified Fidelity in-house counsel and the Fidelity Investments' Chief Financial Officer of Ms. Lawson's concerns regarding the matter that she had learned of when her managers attempted to implicate her in it. Claire Cadogan was extremely upset when she found out that Ms. Lawson had reported the matter to Fidelity Investments legal counsel.

62.1 In her memorandum to Fidelity's counsel, Ms. Lawson explained that she had been advised by Ms. Cadogan in January 2007 that a group within Fidelity Brokerage Services, National Financial ("NF"), had retained approximately $10 million in 12b-1 fees paid by the mutual funds. Ms. Lawson reported further that Claire Cadogan and Harris Komishane had asserted that the issue was a "fund profitability" error, and had asked Ms. Lawson to send an executive summary to Claire Richer, Fidelity CFO. Ms. Lawson reported further that she had learned in investigating the issue that: (1) NF Financial had retained the 12b-1s without authorization and without disclosure to the Fidelity Mutual Funds Board of Trustees; (2) that the Board Support Group had no records tying any NF expenses or traditional distribution activities that would support retention of the 12b-1 activity; (3) that NF had failed to report the

retained 12b-1's; (4) that FMR Co. had misleadingly reported to the Fidelity Mutual Funds Board of Trustees that the 12b-1 fees were "improperly omitted from fund profitability" without disclosing that they had been withheld without authorization and without disclosure to the Board Support Group; and (5) that FMR Co. had misleadingly reported to the Fidelity Mutual Funds Board of Trustees that "National Financial incurs expenses and performs traditional distribution activities that supports retention of 12b-1 fees." Ms. Lawson advised Fidelity's counsel that she believed that the failure by National Financial to disclose the retained 12b-1 fees was a violation of securities laws. Ms. Lawson's letter to counsel is attached as Exhibit A to her third OSHA complaint, which is attached hereto as Exhibit 3.

63. On May 17, 2007 Ms. Lawson was issued in writing an "oral warning" from the Senior Vice President for Shared Services Harris Komishane for purportedly violating Fidelity Investments' policy regarding Insubordination. The "Oral Warning – Policy Violation" was given in retaliation for Ms. Lawson informing the Fidelity Investments legal counsel on May 10 regarding the matters in which her managers had attempted to implicate her and for filing the second Sarbanes-Oxley complaint with OSHA

63.1 On May 21, 2007, Ms. Lawson wrote again to Fidelity counsel, advising counsel that: (1) in 2004 there had been significant changes in certain methodologies in the marketing area; (2) the PI Marketing group was aware of the methodology changes but had

failed to update their model to reflect those changes; (3) the use of stale methodology by PI Finance prior to 2006 resulted in unexplained year over year variances; and (4) FMR Co. falsely reported to the Board of Trustees that the year over year variances were caused by fund profitability errors, rather than disclosing that PI Finance had used stale methodology.

63.2 On June 6, 2007, Ms. Lawson wrote again to Fidelity counsel, explaining in detail the issues regarding call content and guidance interaction. Ms. Lawson explained that the cost pool at issue was significant ($156 million for 2006), that she had learned since her meetings with Fidelity counsel in December 2006 that her fears had been confirmed and that the treatment of these costs were enabling Fidelity to commit fraud against the mutual funds shareholders by charging the mutual funds excessive Transfer Agent fees. Ms. Lawson explained further that the annual Transfer Agent renewal for 2006 and 2007 were based on an understatement of the profit margins in the Transfer Agent Profit & Loss statement, and that these renewals were thus based on false data. Ms. Lawson specified that Fidelity Investments had reported to the Fidelity Mutual Funds Board of Trustees that Transfer Agent profitability for 2005 was 17.6% and for 2006 was 15.1%, and that these profit margins would have been 20.9% and 20.4% for 2005 and 2006 respectively. Ms. Lawson's letter is attached as Attachment C to her third OSHA complaint, which is attached hereto as Exhibit 3.

64. In June 2007, Fidelity Investments assigned a new Vice President, Betsy Connolly, into a newly created, temporary position over Claire Cadogan. Ms. Lawson provided this Vice President with copies of the material Ms. Lawson had prepared regarding her ongoing concerns. Ms. Lawson also advised Betsy Connolly of her pending Sarbanes-Oxley claims and her submissions to the SEC.

65. On July 2, 2007, Ms. Lawson was advised by Vice President Betsy Connolly that Ms. Lawson should take a six to twelve months sabbatical from Fidelity Investments. Ms. Connolly advised Ms. Lawson that it was impossible for her to continue working at Fidelity Investments because of the claims she had made to OSHA and the SEC. Ms. Connolly advised Ms. Lawson that Ms. Connolly had been asked to give Ms. Lawson her annual review, but had declined, because in her view, the review was not consistent with Ms. Lawson's work performance that Ms. Connolly had observed, and because Ms. Connolly had not been present during most of the year covered by the evaluation.

66. On July 2, 2007, Ms. Lawson also learned that she would not be receiving an annual salary increase. Every other member of her team received an annual salary increase.

67. On July 17, 2007, Claire Cadogan and Harris Komishane informed Ms. Lawson that her performance was being rated at the lowest possible level ("Needs Improvement"). This was the first time

in 11 years that Ms. Lawson had received such an evaluation. In giving this evaluation and in denying a salary increase, Ms. Lawson's managers ignored all objective evidence of her successful performance, and instead retaliated against her for bringing forward the issues concerning potential fraud against Fidelity Investments mutual funds shareholders.

67.1 On August 2, 2007, Ms. Lawson, through her attorney, advised Fidelity counsel that the Fidelity Funds' Annual Reports to Shareholders, filed with the Securities and Exchange Commission, were false and misleading in that they did not disclose that incorrect information had been submitted by FMR Co. to the Fidelity Mutual Funds Board of Trustees, that some methodologies approved by the Fidelity Mutual Funds Board of Trustees had not been implemented, and that other methodologies were implemented without being approved by the Fidelity Mutual Funds Board of Trustees. Through her attorney, she also advised Fidelity's counsel that the Annual Reports were also misleading in that they contained numerous statements designed to give the impression that Fidelity Investments and Fidelity Mutual Funds are trustworthy organizations that care about SEC compliance and the shareholders of the Fidelity Funds, and failed to disclose that they were vigorously contesting the applicability of the Sarbanes-Oxley whistleblower provisions and taking the position that Fidelity was free to retaliate against whistleblowers who inform Fidelity of conduct that may involve fraud against shareholders or violate

SEC rules or regulations. A copy of counsel's letter is attached hereto as Exhibit 3, Attachment D.

67.2 On August 10, 2007, Ms. Lawson's counsel advised the OSHA investigator of Ms. Lawson's addition [sic] concerns. A copy of this letter with attached documents is attached hereto as Exhibit 9.

68. On August 16, 2007, Ms. Lawson submitted her response to her 2007 Annual Merit Review to Claire Cadogan, Harris Komishane, Fidelity Investments Human Resources and Fidelity Investments in-house counsel. In that response, Ms. Lawson alleged that the negative evaluations in her 2007 Annual Merit Review were given in retaliation for her protected activity under Sarbanes-Oxley. The protected activity is further detailed in Ms. Lawson's third Complaint and attachments thereto, docketed by OSHA as Case Number 1-0120-07-012, and incorporated herein by reference.

69. On August 27, 2007, the OSHA investigator assigned to Ms. Lawson's case advised both parties that OSHA was rejecting Fidelity Investments' claim that it was not subject to the Sarbanes Oxley whistleblower provisions and that OSHA intended to proceed to investigate the merits of Ms. Lawson's complaint.

70. After Fidelity Investments was advised by OSHA that it would be investigating Ms. Lawson's claims, Ms. Cadogan's abusive behavior toward Ms. Lawson escalated. Ms. Connolly joined Ms. Cadogan in this abusive behavior toward Ms. Lawson. This

abusive behavior towards Ms. Lawson is detailed in her complaint of November 9, 2007, which is attached hereto as Exhibit 1 and incorporated herein by reference. The conduct resulted in working conditions that became so intolerable that Ms. Lawson felt compelled to resign.

71. On September 21, 2007, Ms. Lawson gave notice that she could no longer continue working in her current position due to the extreme harassment that she was being forced to endure. She tendered her resignation, effective October 19, 2007. A copy of Ms. Lawson's letter is attached hereto as Exhibit 5, and incorporated herein.

72. Fidelity Investments did not allow her to continue in her position through October 19, 2007, however, and instead, Ms. Lawson was removed from her position, effective immediately on September 21, 2007.

COUNT I – RETALIATION IN VIOLATION OF 18 U.S.C. § 1514A

73. The allegations of paragraphs of [sic] 1-72 are incorporated herein by reference.

74. Defendants are contractors and/or subcontractors of companies that are required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 780(d)) within the meaning of 18 U.S.C. § 1514A.

75. Plaintiff is an employee of the Defendants within the meaning of 18 U.S.C. § 1514A.

76. The information Plaintiff provided to the Fidelity managers, in-house counsel and the SEC (detailed above) regarded conduct which Ms. Lawson reasonably believed constitutes violations of rules or regulations of the Securities or Exchange Commission and/or provisions of Federal law relating to fraud against shareholders.

77. The Fidelity managers to whom Ms. Lawson provided such information (detailed above) each had supervisor authority over Ms. Lawson and/or had authority to investigate, discover, or terminate misconduct.

78. In providing this information to Fidelity managers, in-house counsel and the SEC, Ms. Lawson engaged in protected conduct.

79. The Complaints Ms. Lawson filed with OSHA (detailed above) related to an alleged violation of rules or regulations of the Securities and Exchange Commission and/or provisions of Federal law relating to fraud against shareholders. In filing these complaints with OSHA, Ms. Lawson engaged in protected conduct.

80. Ms. Lawson's managers responsible for the discriminatory actions and/or harassing conduct were aware of Ms. Lawson's protected conduct.

81. Ms. Lawson's protected conduct constituted contributing factors in Fidelity Investments' discrimination of and harassment towards Ms. Lawson.

82. Fidelity Investments, through its managers Harris Komishane, Betsy Connolly, Claire Cadogan, Jean Raymond and Tim Rooney, engaged in discrimination, harassment and constructive discharge of Plaintiff because of and in retaliation for her lawful and protected acts of providing this information to managers and government agencies and/or for filing her Complaints with [sic] under 18 U.S.C. § 1514A.

COUNT II – WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

83. The allegations of paragraphs of [sic] 1-82 are incorporated herein by reference.

84. Plaintiff was an employee at will at Fidelity Investments.

85. Plaintiff was subjected to working conditions that were so intolerable that she felt compelled to resign.

86. Plaintiff's reasonable decision to resign because of unendurable working conditions constitutes a constructive discharge under Massachusetts law.

87. Fidelity Investments' action in not allowing her to continue in her position through the date of resignation Ms. Lawson had offered, and the removal

from her position one month earlier, also constitutes a discharge.

88. Plaintiff was constructively and/or otherwise discharged because she provided information as detailed above to Fidelity managers who had supervisory authority over Ms. Lawson and/or had authority to investigate, discover, or terminate misconduct and/or to the SEC, regarding conduct that Plaintiff reasonably believed constitutes violations of rules or regulations of the Securities [and] Exchange Commission and/or provisions of Federal law relating to fraud against shareholders.

89. Plaintiff's discharge and/or constructive discharge contradicted well-defined public policies of the Commonwealth of Massachusetts.

89.1 Massachusetts public policy protects whistleblowing concerning potential violations of SEC rules and regulations and federal laws concerning fraud against shareholders.

REQUESTS FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the court grant the following relief:

(1) A declaration that Fidelity Investments, as a contractor and/or subcontractor to the Fidelity Mutual Funds, is a covered employer under 18 U.S.C. § 1514A;

(2) Permanent injunctive relief directing Defendants to reinstate Ms. Lawson at her prior level of Senior Director;

(3) Back pay, with interest;

(4) Emotional distress damages;

(5) Punitive damages; and

(6) Compensation for special damages, including litigation costs, expert witness fees and reasonable attorney fees.

JURY TRIAL DEMAND

PLAINTIFF HEREBY DEMANDS A TRIAL BY JURY ON ALL ISSUES SO TRIABLE.

Respectfully submitted,

JACKIE HOSANG LAWSON

By her attoney,

/s/ Indira Talwani

Indira Talwani
SEGAL ROITMAN, LLP
111 Devonshire Street
5th Floor
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Dated: September 19, 2008

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JONATHAN M. ZANG, Plaintiff, v. FIDELITY MANAGEMENT & RESEARCH COMPANY, FMR CO., INC., and FMR LLC f/k/a FMR CORP., Defendants.	)	Civil Action No.

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, Jonathan M. Zang ("Zang"), brings this Complaint against defendants Fidelity Management & Research Company, FMR Co., Inc., and FMR LLC f/k/a FMR Corp. (collectively "Defendants" or "Fidelity") to recover for the Defendants' unlawful termination of Zang in retaliation for his providing information concerning Fidelity's violations of Securities and Exchange Commission ("SEC") rules and regulations, and other provisions of Federal securities law.

The Defendants, their registered investment companies or mutual funds, and their affiliated companies and entities hold themselves out to the investing public as "Fidelity" and "Fidelity Investments." Together, these entities form an integrated enterprise, within which are a set of interconnected, agency, and contractor relationships, and other affiliations. Fidelity

is the largest mutual fund company in the country, investing approximately $1.2 trillion dollars on behalf of millions of individual and institutional investors, including residents of the Commonwealth of Massachusetts.

Zang was a successful research analyst and portfolio manager with Fidelity, with more than seven years tenure. After Zang identified and brought to his superiors' attention violations of federal securities laws and regulations concerning Fidelity's mutual funds, the Defendants retaliated against Zang and terminated him because of his whistle-blowing activities.

Defendants' termination of Zang is in violation of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Tile [sic] VIII of the Sarbanes-Oxley Act of 2002 ("SOX"), codified at 18 U.S.C. § 1514A, and is a wrongful discharge in violation of Massachusetts public policy.

JURISDICTION AND VENUE

1. Jurisdiction over Zang's federal claim is proper in the District of Massachusetts under 28 U.S.C. § 1331 and 18 U.S.C. § 1514A(b)(1)(B) because Zang filed a complaint with the Secretary of Labor under 18 U.S.C. § 1514A(b)(1)(A), and the Secretary of Labor has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to any bad faith on the

part of Zang. Jurisdiction over Zang's state law claim is proper under 28 U.S.C. § 1367(a).

2. Venue is proper in the District of Massachusetts under 28 U.S.C. § 1391(b). This is a civil action wherein jurisdiction is not founded solely on diversity of citizenship and a substantial part of the events or omissions giving rise to Zang's claim occurred in this District.

PARTIES

3. Plaintiff Jonathan M. Zang is an individual residing in Boston, Massachusetts.

4. Defendant Fidelity Management & Research Company is a Massachusetts corporation with its usual place of business at 82 Devonshire Street, Boston, MA.

5. Defendant FMR Co., Inc. is a Massachusetts corporation with its usual place of business at 82 Devonshire Street, Boston, MA.

6. Defendant FMR LLC is a limited liability company organized under the laws of Delaware and registered to do business in Massachusetts, with its usual place of business at 82 Devonshire Street, Boston, MA, and is on information and belief the successor to FMR Corp., a Delaware corporation registered to do business in Massachusetts.

FACTS

THE FIDELITY COMPANIES

7. Defendants manage and operate the approximately 350 "Fidelity Investments" mutual funds ("Funds"), each of which is a registered investment company that, like other public companies, is required to file reports under Section 15(d) of the Securities Exchange Act of 1934.

8. FMR LLC is the parent company of Fidelity Management & Research Company.

9. Fidelity Management & Research Company is the investment adviser to the Funds, pursuant to management contracts between each of the Funds and Fidelity Management & Research Company ("Management Contracts").

10. Fidelity Management & Research Company is the parent company of FMR Co., Inc.

11. FMR Co., Inc. is an investment sub-adviser to certain of the Funds, pursuant to sub-advisory contracts between Fidelity Management & Research Company and FMR Co., Inc.

12. The Defendants and the Funds, representing various Fidelity companies, subsidiaries and affiliates, collectively operate and hold themselves out as Fidelity and Fidelity Investments.

13. Fidelity Management & Research Company and FMR Co., Inc. are contractors and/or subcontractors of the Funds within the meaning of 18 U.S.C. § 1514A.

14. All day-to-day operational, investment, reporting and employment functions and decisions necessary to the operation of the Funds are made and effected by Fidelity Management & Research Company and/or FMR Co., Inc.

15. In their capacities as contractors and/or subcontractors to the Funds, Fidelity Management & Research Company and/or FMR Co., Inc. perform, among other things, all of the management and administrative functions necessary for the operation of the Funds; furnish and pay for all of the office space, facilities and personnel necessary for managing the investments of the Funds; direct all of the investments of the Funds; trade in securities on behalf of the Funds; hire and pay all personnel performing research related to the Funds and their investments; and prepare and submit all public reports, prospectuses and regulatory filings on behalf of the Funds as required for the Fund's existence, including the Funds' filings with the SEC as required by Section 15(d) of the Securities Exchange Act of 1934.

16. FMR Co., Inc. was formed in 1999 specifically for the purpose of becoming the sub-adviser to the Funds, and on information and belief, all or substantially all of its activities are performed for and on behalf of the Funds.

17. Fidelity Management & Research Company and FMR Co., Inc., as investment advisers to registered investment companies, regularly file reports

with the SEC on behalf of the registered investment companies they manage, pursuant to their management contracts and the Securities Exchange Act of 1934.

18. Fidelity is a covered employer under the whistleblower provisions of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, since the Funds, like other public companies, are required to file reports under section 15(d) of the Securities Exchange Act of 1934.

ZANG'S EMPLOYMENT

19. Zang began his career at Fidelity in 1997 as an equity research analyst, and, in addition to his responsibilities as an equity research analyst, began various assignments as portfolio manager of certain Fidelity Select mutual funds in 1998, and performed both of these functions until his termination in 2005.

20. Pursuant to Zang's employment agreement with Fidelity, Zang was employed "by FMR Corp. and/or any entity which is directly or indirectly owned or controlled wholly or in part by FMR Corp."

21. Initially, Zang's direct employer was Fidelity Management & Research Company.

22. Without notice to Zang, in or about 2001, Fidelity changed Zang's direct employer to FMR Co., Inc., which remained Zang's employer until Zang's termination in 2005.

23. As an equity research analyst, Zang was responsible for influencing the investment decisions and portfolio holdings of the Funds.

24. During various periods between 1998 and 2005, Zang was the portfolio manager of the following Fidelity mutual funds: Fidelity Select Utilities Growth fund, Fidelity Select Chemicals fund, Fidelity Select Medical Delivery fund, and Fidelity Select Natural Gas fund.

25. As portfolio manager of various Fidelity Select mutual funds, Zang selected the respective funds' investment securities; communicated with external entities about the respective funds' performance and investment strategies; and assisted in the preparation and/or review of various shareholder reports and other disclosures which were filed by Fidelity with the SEC on behalf of the respective funds.

26. During the entire period of Zang's employment, each and every one of Zang's job responsibilities related to Fidelity's contractual obligations under the Management Contracts to provide all services necessary to the Funds for their operation and continued existence.

27. During the entire period of Zang's employment, Fidelity evaluated Zang's job performance and compensated Zang based on his work on behalf of the Funds.

28. In 1997, Zang began researching electric utility stocks for Fidelity on behalf of the Funds.

29. From early in his career at Fidelity, Zang was praised for the depth and quality of his work and the accuracy of his stock picks.

30. In 1999, Zang's research assignment was changed from utilities to the chemicals industry.

31. In 2002, Zang's research assignment was changed from chemicals to health care services stocks.

32. On September 15, 2004, Katherine Collins, Fidelity's Group Leader of U.S. Equity Research, who had supervisory responsibility over Zang, and Jeffrey Feingold, Fidelity's Co-Director of Equity Research and Zang's direct supervisor, informed Zang that his research assignment would be changed from health care services to oil and natural gas exploration and production.

33. On September 27, 2004, Zang was informed that he would also be responsible for researching the U.S. coal mining industry.

34. Although Ms. Collins initially claimed that this change in Zang's research assignment was based on Zang's demonstrated ability to do in-depth work on long-term industry trends and Fidelity's need for additional expertise of this nature in the energy sector, Ms. Collins later admitted to Zang that his transfer was also based on Fidelity's belief that researching energy companies would be a "better fit"

for Zang in light of his recent diagnosis with Attention Deficit Disorder ("ADD").

35. Fidelity encouraged Zang to take the time necessary to learn the new industries to which he was assigned, and achieve the in-depth knowledge for which Zang had been highly regarded during his prior research assignments, and which Fidelity said it required in Zang's new research assignment.

Zang's Career Prospects
Prior to His Protected Conduct

36. Prior to his protected conduct, Zang was receiving praise from both within and outside of Fidelity for delivering outstanding returns to Fidelity's shareholders.

37. In Zang's June 14, 2004 Merit Review, Fidelity awarded Zang a merit-based compensation increase and praised Zang's "significant efforts during this period" which "resulted in broader coverage and a higher level of impact with Fidelity's fund managers."

38. On December 1, 2004, Fidelity awarded Zang a "High Achiever Award" bonus for his performance as portfolio manager of the Fidelity Select Medical Delivery fund for producing the highest relative return among Fidelity's 49 Select funds during a recent 12-month period.

39. In Zang's December 6, 2004 Bonus Review, Mr. Feingold and Ms. Collins awarded Zang 95% of

his maximum annual bonus attributable to their assessment of Zang's overall job performance during the year under review, and Fidelity awarded Zang a merit-based compensation increase.

40. In a January 7, 2005 article, *Boston Business Journal* declared that "Fidelity Investments' Jonathan Zang . . . could be a star manager in the making . . . His $282 million Fidelity Select Medical returned 45% [in 2004] – second best locally – compared with an industry wide 8%."

41. In a January 25, 2005 email to Ms. Collins, Mr. Feingold recognized Zang's initial efforts to learn about his new research assignment within the energy sector, praising Zang for "staying on top of current trends as he puts out w/ the sector specialist weekly summaries of the industry," and Mr. Feingold again commended Zang for "a lot of progress w/ PMs [portfolio managers] over the last 12 months."

ZANG'S PROTECTED COMMUNICATIONS CONCERNING FIDELITY'S SECURITIES LAW VIOLATIONS

42. On February 18, 2005, Fidelity internally distributed and transmitted to the SEC a draft of its revised registration statement for Fidelity Select Portfolios, including a revised Statement of Additional Information ("SAI"), which was to become effective April 29, 2005 (the "February 18, 2005 SAI").

43. Fidelity Select Portfolios is a Massachusetts business trust which was comprised during the relevant period of approximately 49 mutual funds, each of which was a registered investment company, which were managed and operated by Defendants and which were marketed to their public shareholders as "Fidelity Select" mutual funds.

44. Zang was one of the employees whom Fidelity asked to review the February 18, 2005 SAI.

45. When Zang reviewed certain newly-required disclosures in the February 18, 2005 SAI, he believed that said disclosures contained material inaccuracies and omissions.

46. Following the distribution of the February 18, 2005 SAI, Zang discussed with several superiors at Fidelity his concerns that certain disclosures in the February 18, 2005 SAI were inaccurate.

47. On March 4, 2005, Zang informed Mr. Feingold that he believed certain newly-required disclosures in the February 18, 2005 SAI regarding the Select funds' portfolio managers' compensation ("Compensation Disclosures") were inaccurate.

48. Mr. Feingold did not disagree with Zang's assessment that the Compensation Disclosures were inaccurate, but informed Zang that he would not attempt to improve the accuracy of said disclosures.

49. On March 13, 2005, Zang sent an email memorandum to supervisors and colleagues (the "March 2005 Email Memorandum") in which he

provided information to the Defendants that Fidelity's disclosures in certain of its SEC filings on behalf of the Funds, including the Compensation Disclosures, were inaccurate or otherwise constituted violations of SEC rules and regulations and/or Federal laws relating to fraud against shareholders.

50. A true copy of the March 2005 Email Memorandum is attached hereto as *Exhibit A*.

Information Concerning Fidelity's
False and Misleading Statements About
Select Fund Manager Compensation

51. At the time of Fidelity's transmittal of the Compensation Disclosures to the SEC, Fidelity's Funds were required, pursuant to 17 C.F.R. § 274.11A and SEC Form N-1A, to describe in its Statement of Additional Information, "the structure of, and the method used to determine, the compensation of each Portfolio Manager," and "[f]or each type of compensation (*e.g.*, salary, bonus, deferred compensation, retirement plans and arrangements), [to] describe with specificity the criteria on which that type of compensation is based, for example, whether compensation is fixed, whether (and, if so, how) compensation is based on Fund pre-or after-tax performance over a certain time period, and whether (and, if so, how) compensation is based on the value of assets held in the Fund's portfolio."

52. In his March 2005 Email Memorandum, Zang provided information to Fidelity that the

Compensation Disclosures prepared by Fidelity and filed with the SEC on behalf of Fidelity Select Portfolios contained false and misleading statements or omissions regarding Fidelity's compensation of Fidelity Select Portfolios' equity portfolio managers.

53. In his March 2005 Email Memorandum, Zang informed Fidelity that the Compensation Disclosures overstated the connection between a Select fund's performance and the compensation of the Select fund's portfolio manager.

54. Zang informed Fidelity that the Compensation Disclosures failed to state accurately the extent to which a Select fund's portfolio manager's compensation was actually driven by the portfolio manager's performance as a research analyst providing services to other Fidelity mutual funds, as evaluated by the portfolio managers of these other Fidelity mutual funds, rather than by their performance as portfolio manager of their respective Select funds.

55. Zang reasonably believed that Fidelity's disclosures regarding the factors Fidelity used in determining his and other equity Select fund portfolio managers' compensation were misleading.

56. Section 17(a) of the Securities Act of 1933, codified at 15 U.S.C. § 77a *et seq.*, (the "Securities Act") provides that it is unlawful in connection with the sale of a security to make any untrue statement of a material fact, or to omit to state a fact that is necessary in order to make the statements made not misleading.

57. Section 34(b) of the Investment Company Act of 1940, codified at 15 U.S.C. § 80a-1 *et seq.* (the "Investment Company Act"), provides that it is "unlawful for any person to make any untrue statement of a material fact in any registration statement, application, report, account, record, or other document filed or transmitted pursuant [the Investment Company Act] or the keeping of which is required pursuant to section 31(a) [15 U.S.C. § 80a-30(a)] [and] for any person so filing, transmitting, or keeping any such document to omit to state therein any fact necessary in order to prevent the statements made therein, in the light of the circumstances under which they were made, from being materially misleading."

58. Section 15(c) of the Investment Company Act imposes on Fidelity, as an investment adviser to the registered investment companies comprising the Fidelity Investments mutual funds, an obligation to make available to the mutual funds' boards of directors all information "as may reasonably be necessary to evaluate the terms of any contract whereby a person undertakes regularly to serve or act as investment adviser of such company."

59. Section 36(b) of the Investment Company Act provides that Fidelity, as investment adviser to the Fidelity Investments mutual funds, has "a fiduciary duty with respect to the receipt of compensation for services, or of payments of a material nature, paid by such registered investment company [i.e., the Funds], or by the security holders thereof, to such

investment adviser or any affiliated person of such investment adviser."

60. Zang reasonably believed that the Compensation Disclosures violated SEC rules and regulations and/or Federal laws related to fraud against shareholders

61. The Compensation Disclosures violated Section 17(a) of the Securities Act, Sections 15(c), 34(b) and 36(b) of the Investment Company Act and SEC regulations pertaining to Form N-1A as required by 17 C.F.R. § 274.11A. and other securities regulations and laws related to fraud against shareholders.

Information Concerning Fidelity's Operation of Veiled Index Funds

62. In his March 2005 Email Memorandum, Zang also communicated to Fidelity that he was concerned that Fidelity was operating "veiled index funds."

63. A veiled index fund is a mutual fund that purports to be actively managed, and for which the fund's investment adviser collects a management fee from the fund's shareholders based on the investment adviser's alleged active management of the fund's investments, but which in reality is largely indistinguishable from an unmanaged index of stocks.

64. Zang reasonably believed that certain of the Funds, including the Fidelity Trend fund, were veiled index funds.

65. Fidelity's operation of veiled index funds constituted, and Zang reasonably believed Fidelity's operation of such funds constituted, breaches of Fidelity's duties as an investment adviser to the respective investment companies and their shareholders.

66. Zang reasonably believed that Fidelity's failure to disclose its operation of veiled index funds to the respective funds' shareholders, to the funds' boards of trustees, and in the funds' SEC filings, violated SEC rules and regulations and/or Federal laws related to fraud against shareholders.

67. Fidelity's failures to disclose its operation of veiled index funds violated Section 17(a) of the Securities Act of 1933, Sections 15(c), 34(b) and 36(b) of the Investment Company Act of 1940, and other SEC rules and regulations and/or Federal laws related to fraud against shareholders.

Information Concerning
Fidelity's Other Conflicts of Interest

68. Throughout his 2005 Email Memorandum, Zang informed Fidelity that its operation and management of the Funds created numerous conflicts of interest, and that these conflicts and Fidelity's failure to accurately disclose them harmed the Funds' shareholders.

69. Zang reasonably believed that Fidelity's conflicts of interest and its failure to properly disclose

them violated SEC rules and regulations and/or Federal laws related to fraud against shareholders.

70. Fidelity's conflicts of interest and its failure to properly disclose them violated Section 17(a) of the Securities Act of 1933, Sections 15(c), 34(b) and 36(b) of the Investment Company Act of 1940, and other SEC rules and regulations and/or Federal laws related to fraud against shareholders.

The March 18, 2005 Meeting

71. On March 18, 2005, at the direction of FMR Corp. Senior Vice President and Deputy General Counsel Holly Laurent, FMR Corp. Associate General Counsel Mark Jensen met with Zang to review Zang's concerns regarding the Compensation Disclosures in the February 18, 2005 SAI.

72. Pursuant to Section 307 of the Sarbanes-Oxley Act of 2002, in directing Mr. Jensen to meet with Zang to investigate Zang's concerns about the Compensation Disclosures, and, thereafter, in supervising Mr. Jensen's investigation into Zang's concerns, Ms. Laurent, in addition to representing Fidelity, also represented, and acted on behalf of, Fidelity Select Portfolios and its constituent mutual funds.

73. Pursuant to Section 307 of the Sarbanes-Oxley Act of 2002, in investigating Zang's concerns about the Compensation Disclosures, Mr. Jensen, in addition to representing Fidelity, also represented,

and acted on behalf of, Fidelity Select Portfolios and its constituent mutual funds.

74. On March 18, 2005, Zang met with Mr. Jensen to assist Mr. Jensen in his investigation of Zang's concerns that the Compensation Disclosures violated SEC rules and regulations and/or Federal laws related to fraud against shareholders.

75. When Zang met with Mr. Jensen on March 18, 2005, Zang again provided Defendants with information regarding what Zang reasonably believed were violations of SEC rules and regulations and/or Federal laws related to fraud against shareholders, including information about Zang's reasonable belief that the Compensation Disclosures were misleading.

76. At the conclusion of their meeting, Mr. Jensen admitted to Zang that the Compensation Disclosures may need to be revised.

Zang's Continued Protected Conduct
Concerning Fidelity's Inaccurate Disclosures

77. On April 4, 2005, Fidelity internally distributed a revised draft of its registration statement for Fidelity Select Portfolios, which contained no material revisions to the Compensation Disclosures.

78. In a meeting on April 7, 2005 with FMR Co., Inc.'s Director of Human Resources, Fatima Penrose, Zang again expressed his concerns that the Compensation Disclosures were inaccurate.

79. On April 11, 2005, Zang sent an email to the President of Fidelity Management & Research Company and FMR Co., Inc., Abigail Johnson, and other members of Fidelity management, in which he again called attention to his concerns about the Compensation Disclosures.

80. On April 28, 2005, Fidelity transmitted to the SEC a revised registration statement for Fidelity Select Portfolios, including a revised SAI (the "April 28, 2005 SAI"), which became effective April 29, 2005.

81. The April 28, 2005 SAI contained revisions to the Compensation Disclosures which were made as a result of Zang's concerns.

82. Four months after meeting with Zang, and following Fidelity's termination of Zang's employment, Mr. Jensen described in a July 25, 2005 memorandum his investigation into Zang's concerns about the Compensation Disclosures. A true copy of Mr. Jensen's memorandum is attached hereto as *Exhibit B*.

FIDELITY'S RETALIATION AGAINST ZANG

83. Two days after Zang sent the March 2005 Email Memorandum, Ms. Collins informed Zang, in a March 15, 2005 email, that his previously required attendance at a March 17, 2005 Fidelity Select Medical Delivery fund board of trustees meeting ("Board of Trustees Meeting") had been withdrawn. A true copy of Ms. Collins' email is attached hereto as *Exhibit C*.

84. In the days before Zang sent the March 2005 Email Memorandum, Ms. Collins and others acting on her behalf had repeatedly instructed Zang that he was required to attend the Board of Trustees Meeting.

85. Zang was the portfolio manager of the Fidelity Select Medical Delivery fund for eleven of the twelve months under review at the Board of Trustees Meeting, and portfolio managers regularly attended such reviews to provide information to a fund's board of trustees during the board's review of a fund's prior year's performance.

86. On March 15, 2005, Ms. Collins also met with Zang regarding the March 2005 Email Memorandum ("March 15, 2005 Collins Meeting").

87. In that meeting, Ms. Collins said nothing about whether the March 2005 Email Memorandum violated any Fidelity policies, nor did she address any of the substantive issues raised in Zang's memorandum. Rather, Ms. Collins became irate and informed Zang that she viewed the March 2005 Email Memorandum as a "personal betrayal" by Zang.

88. On March 14, 2005, Mr. Feingold, who was Zang's direct supervisor, sent Ms. Collins an email describing Zang's job performance ("March 14, 2005 Feingold Email").

89. The March 14, 2005 Feingold email does not make any reference to any allegedly unsatisfactory

job performance by Zang. A true copy of the March 14, 2005 Feingold email is attached hereto as *Exhibit D*.

90. On March 16, 2005, in an apparent attempt to create a pretext for Fidelity's unlawful termination of Zang's employment, Ms. Collins sent an email to FMR Co., Inc.'s Director of Human Resources, Fatima Penrose, in which she criticized Zang's job performance ("March 16, 2005 Collins Email"). A true copy of the March 16, 2005 Collins Email is attached hereto as *Exhibit E*.

91. The March 16, 2005 Collins Email falsely claimed that Ms. Collins and Mr. Feingold had been meeting frequently with Zang regarding their purported concerns about Zang's job performance.

92. Ms. Collins' claims about Zang's job performance were unwarranted, baseless, and belied by her own evaluation of, and instructions to, Zang concerning his assignment to the energy sector, and by Mr. Feingold's email to Ms. Collins just two days prior.

93. On March 18, 2005, Ms. Collins sent a voicemail ("March 18, 2005 Collins Voicemail") to, upon information and belief, all members of the Fidelity Equity Department stating that "in no uncertain terms the actions of one of our analysts earlier this week were completely unacceptable and unprofessional" and that Zang's conduct was "a real disservice to the vast majority of people" at Fidelity.

94. The March 18, 2005 Collins Voicemail was directed at Zang in response to the March 2005 Email Memorandum.

95. In a written warning drafted on March 15, 2005 and issued to Zang by Collins on March 22, 2005 ("Written Warning"), Fidelity alleged that the March 2005 Email Memorandum violated Fidelity's policies on solicitation and electronic communications, and warned Zang that "any further behavior similar to this situation will not be tolerated" and could result in the termination of Zang's employment.

96. The March 18, 2005 Collins Voicemail made no mention of any alleged policy violations by Zang.

97. Similarly, neither the March 14, 2005 Feingold Email nor the March 16, 2005 Collins Email made any mention of any alleged policy violations by Zang.

98. The March 2005 Email Memorandum did not constitute a "solicitation" under Fidelity's electronic communications policies, and the March 2005 Email Memorandum did not violate any Fidelity policy.

99. Shortly before terminating Zang's employment, but after additional retaliatory conduct towards Zang, Fidelity retracted its Written Warning.

100. On May 10, 2005, Mr. Feingold informed Zang that Fidelity's management was unsure whether it wanted Zang to be a member of "the team." Mr.

Feingold also questioned Zang about his commitment to Fidelity.

101. On June 17, 2005, FMR Co., Inc. Senior Vice President of Equity Research and Asset Allocation, Boyce Greer, announced the winner of a semi-annual bonus regularly awarded to the Select fund manager who generated the highest relative rate of return compared to an associated internal Fidelity index over a preceding 12-month period. The award Mr. Greer announced on June 17, 2005 recognized outstanding Fidelity Select fund relative performance for the 12 months ending March, 2005 ("Select Fund Award").

102. Zang's performance as Select fund manager outpaced the performance of all other Fidelity Select fund managers during this period, as the funds under Zang's management generated a relative return of 20.2%.

103. Despite Zang's superior performance, he was not awarded the bonus.

104. Upon information and belief, Fidelity issued the Select Fund Award to a Select fund portfolio manager who had generated the second-highest relative Select fund return during the period, which was less than 10%.

FIDELITY'S TERMINATION OF ZANG

105. On June 27, 2005, Zang was informed by Mr. Greer and FMR Co., Inc. Human Resources Vice

President Dana Lombardi that Fidelity was terminating his employment, effective July 15, 2005.

106. Although Fidelity has a written "corrective action policy" that requires a progressive discipline approach for addressing employee performance and/or misconduct issues, Fidelity provided no explanation to Zang as to why it was disregarding its own policies in terminating Zang.

107. Beginning in June 2005, Zang or his attorneys repeatedly requested a complete copy of his personnel record, including a copy of his 2005 Merit Review, which Mr. Greer had been scheduled to review with Zang on June 29, 2005, and any documents related to Zang's termination.

108. It was not until November 1, 2005, months after Zang's termination, that Fidelity produced to Zang a document entitled "Termination Points" describing Fidelity's alleged justification for terminating Zang's employment, and a document purporting to be Zang's "2005 Merit Review."

109. Fidelity never completed its 2005 Merit Review for Zang.

110. The "Termination Points" document provided to Zang indicates that after Fidelity informed Zang it was terminating his employment, it attempted to craft a false justification for Zang's termination based on Zang's purported performance deficiencies.

111. On June 30, 2005, Fidelity informed Zang that it was permanently prohibiting his future employment at any Fidelity-controlled company.

112. On June 30, 2005, Fidelity also gave Zang a separation agreement which offered Zang six months of severance pay, but Fidelity then immediately rescinded its severance offer, claiming that it had been made solely due to administrative error.

113. Fidelity terminated the employment of two portfolio managers around the same time as it terminated Zang's employment.

114. After Zang filed his whistleblower complaint with the Department of Labor, Fidelity claimed that its termination of Zang's employment occurred as a result of a review of its personnel following a May 2, 2005 management reorganization at Fidelity Management & Research Company and FMR Co., Inc., and that Zang's employment was terminated as a result of the same review which had led to the termination of the two portfolio managers.

115. Upon information and belief, Fidelity provided severance pay to the two portfolio managers whose employment it terminated around the same time it terminated Zang's employment.

116. Fidelity did not offer Zang any severance pay because Zang's employment was not terminated as a result of the same review which led to the termination of the two portfolio managers' employment.

Instead, Fidelity terminated Zang's employment because of Zang's protected conduct.

117. On July 15, 2005, Fidelity terminated Zang's employment.

ZANG'S PURSUIT OF ADMINISTRATIVE REMEDIES

118. On September 15, 2005, Zang filed a complaint with the United States Department of Labor, Occupational Safety & Health Administration ("OSHA") in accordance with 18 U.S.C. § 1514A(b)(1)(A) and 29 C.F.R. § 1980.103. A true copy of that complaint, which was given case number 1-0120-05-016 is attached hereto as *Exhibit F*.

119. On February 1, 2007, OSHA issued its preliminary findings on behalf of the Secretary of Labor.

120. OSHA determined that Zang was a covered employee within the meaning of 18 U.S.C. § 1514A, but found that Zang had not engaged in protected conduct and dismissed Zang's complaint.

121. Zang timely objected to the Secretary's preliminary findings and requested a hearing before an Administrative Law Judge ("ALJ"), which was designated Case No. 2007-SOX-27.

122. On April 3, 2007, Fidelity filed a motion for summary decision, alleging that Zang was not a covered employee within the meaning of 18 U.S.C.

§ 1514A, and that Zang had not engaged in protected conduct.

123. Following Zang's opposition to Fidelity's motion for summary decision, the ALJ permitted Zang to take limited discovery concerning solely his status as a covered employee under 18 U.S.C. § 1514A.

124. On March 27, 2008, the ALJ issued a Decision and Order Granting Summary Decision Dismissing Complaint, dismissing Zang's complaint.

125. On April 9, 2008, Zang petitioned for review of the ALJ Decision and Order pursuant to 29 C.F.R. § 1980.110(a).

126. On April 16, 2008, more than 180 days having passed since Zang first filed his complaint and no final decision having been issued by the Secretary of Labor, Zang gave notice, pursuant to 29 C.F.R. § 1980.114(b), of his intention to file an action in the United States District Court. A true copy of Zang's Notice of Intent to File Sarbanes-Oxley Complaint in United States District Court is attached hereto as *Exhibit G*.

127. More than fifteen (15) days after giving notice, Zang filed the complaint herein. No further action has been taken by the Secretary of Labor and this Court may properly hear this action *de novo*, pursuant to, among other things, 18 U.S.C. § 1514A(b)(1)(B).

COUNT I – RETALIATION IN VIOLATION OF 18 U.S.C. § 1514A

128. Zang restates and incorporates each of the foregoing allegations as if fully alleged herein.

129. The Plaintiff was at all relevant times an employee covered by the whistle-blower protections of SOX, as codified at 18 U.S.C. § 1514A.

130. The Defendants were at all relevant times contractors, subcontractors, or agents, within the meaning of 18 U.S.C. § 1514A, of the Funds, or were integrated entities of the Funds.

131. The Funds are required to file reports under section 15(d) of the Securities Exchange Act of 1934, within the meaning of 18 U.S.C. § 1514A.

132. FMR Co., Inc. was formed for the purpose of serving as the investment sub-adviser to certain of the Fidelity Investment mutual funds.

133. As an investment adviser to certain of the Funds, FMR Co., Inc. regularly prepares and files required reports with the SEC, pursuant to Section 15(d) of the Securities Exchange Act of 1934, and each of the respective funds' management contracts with Fidelity.

134. All of Zang's job responsibilities were performed for and on behalf of the Funds.

135. Zang provided information to Fidelity's management, including its in-house counsel, and to Fidelity Select Portfolios, as alleged above, concerning

what Zang reasonably believed to constitute violations of SEC rules and regulations and provisions of Federal law relating to fraud against shareholders.

136. The Fidelity managers to whom Zang provided such information, as alleged above, had supervisory authority over Zang and/or had authority to investigate, discover or terminate misconduct.

137. In providing this information to Fidelity's managers and in-house counsel, and to Fidelity Select Portfolios, Zang engaged in conduct protected by 18 U.S.C. § 1514A.

138. Fidelity reprimanded, terminated, and otherwise retaliated against Zang in the terms and conditions of his employment because of his lawful acts in providing information to Fidelity's managers and in-house counsel, and to Fidelity Select Portfolios, as alleged herein.

139. As a result of the Defendants' actions in violation of 18 U.S.C. § 1514A, Zang has and continues to suffer harm.

COUNT II – WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

140. Zang restates and incorporates each of the foregoing allegations as if fully alleged herein.

141. Zang was an employee-at-will of Fidelity.

142. Zang was discharged because he provided information to Fidelity's managers and in-house

counsel, and to Fidelity Select Portfolios, who had supervisory authority over Zang and had authority to investigate, discover or terminate misconduct, concerning what Zang reasonably believed to constitute violations of SEC rules and regulations and provisions of Federal law relating to fraud against shareholders.

143. Zang's discharge contradicted well-defined public policies of the Commonwealth of Massachusetts, including the Commonwealth's public policy interests in protecting investors in mutual funds and other companies issuing public securities from fraud, and in protecting the reporting of such fraud by employees consistent with federal whistle-blower provisions.

WHEREFORE, Plaintiff Jonathan M. Zang respectfully requests that the Court grant the following relief:

(1) Enter an order that Defendants reinstate Zang to his prior position with the same seniority status that he would have had absent Defendants' wrongdoing;

(2) Award Zang back pay, with interest;

(3) Award punitive damages;

(4) Award Zang compensation for special damages sustained as a result of the Defendants' discrimination, including litigation costs, expert witness fees and reasonable attorneys' fees; and

(5) Award such other relief the Court deems appropriate.

JURY TRIAL DEMAND

PLAINTIFF HEREBY DEMANDS A TRIAL BY JURY OF ALL ISSUES SO TRIABLE.

JONATHAN M. ZANG
By his attorneys,

/s/ Alan D. Rose

Alan D. Rose
(BBO #427280)
Nicholas J. Rosenberg
(BBO #643366)
ROSE, CHINITZ & ROSE
29 Commonwealth Avenue
Boston, MA 02116
Tel: 617-536-0040
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Dated: May 5, 2008

[ZANG COMPLAINT, EXHIBIT B]

WE SHOULD EACH TAKE A STAND TO SAVE FMR

From: Zang, Jonathan [IMCEAEX-_0=FIDELITY.OU=NORTHEAST1.CN=RECIPIENTS_CN=A21139@uk.fid-intl.com]

Sent: Sunday, March 13, 2005 9:24 PM

To: Collins, Katherine; Zinny, Martin; Addison, Andrew; Baker, Gavin; Bartel, Chris; Berger, Susan; Burzumato, Andrew; Calderon, Ruben; Cardwell, Kelly; Carere, Harlan; Chai, Charlie; Cooper, Aaron; Creedon, Nora; Dibble, Mark; Esposito, Nicole; Feingold, Jeff; Friedholm, Valerie; Friedman, Matthew; Fruhan, Matthew; Harris, Lionel; Hatem, Andrew; Hebard, Charlie; Hermsdorf, Stephen; Hirsch, Peter; Jortner, Jill; Kennedy, Brian; Khan, Naved; Krenn, Adam; Lawrence, Heather; Lee, Christopher; Lee, Robert; Lempel, Brian; Leness, Kate; Lentz, Matthew, Lesser, Rayna; Liou, Jane; Mattingly, Lisa E.; Mehra, Anmol; Mitchell, Jeff; Morrow, James; Myers, Chuck; Persaud, Ramona; Peters, Sam; Peterson, Kelsey; Reddy, Gopal; Roth, John; Russo, James; Sabel, Matthew; Schneider, Michael; Shanley, William; Simmons, Douglas; Simnegar, Sammy; Stafford, Nicola; Strik, Nathan; Sweeney, Sharon; Tan, Ching; Taylor, Yolanda; Thayer, Phil; Timmer, Jurrien; Venanzi, Patrick; Wald, Sam; Weiss, Jed; Younger, Brian; Rosen, Anne; Chen, Catherine; Fanning, Susan; Haddock, Nell; Lin, Christopher; McCormick, Evan;

McElligott, James; Miller, Uri; Mirshekari, John; Peck, Morgen; Piggott, Benjamin; Wymer, Steve; Allen, Tom; Antico, Paul; Arani, Ramin; Avery, John; Bertelson, Bob; Binder, Stephen; Bower, Bill; Buller, Steven; Calhoun, Steve; Catudal, James; Chow, Bob; Cohen, Tim; Danoff, Will; Dobkin, Penny; Doulton, Bettina; Dufour, Stephen M.; Fam, Bahaa; Feldman, Robert S; Fentin, Richard; Firestone, Karen; Haber, Bob; Haberman, Dick; Hanson, Brian; Harmon, Jamie; Heffernan, Tim; Hense, Thomas; Hernandez, Cesar E.; Herring, Bruce; Hetnarski, Adam; Hogan, Brian; Kalra, Sonu; Kaul, Rajiv; Kaye, Steve; Korhonen, Jorma UK; Lange, Harry; LeMieux, Maxime; Leviton, Harris; Lieberman, Kathy (Buck); Lober, Doug; Macdonald Robert L.; Mace, Rick; Mangum, Charles; McCarey, Kevin; McDowell, John; Miller, Neal P.; Offen, Scott; O'Neil, Ford; Perkins, Shep; Petersen, Stephen; Porter, John; Quinton, Keith; Radlo, Alan; Rakers, Larry; Reed, Brenda (UK); Richardson, Kennedy; Salemy, Louis; Saperstone, Peter; Snider, Steven J.; Snyderman, Mark; St Clair, Forrest; Stansky, Robert; Thay, Victor; Tillinghast, Joel; Wonisch, Myra; Uhrig, Jennifer; Weiner, Jason; Johnson, Abby; Johnson, Edward C. 3d; Reynolds, Robert; Wilson, Ellen HR

Subject: WE SHOULD EACH TAKE A STAND TO SAVE FMR

• I've had conversations with many of you about the past, present and future of our department, and

recognize there are many other conversions taking place. The urgency of our task began to crystallize for me a year ago when I reviewed my 1996 summer internship presentation, "Maximizing the Value of Fidelity Equity Research," and was startled to realize we have tolerated many of the same long-standing concerns for at least the past eight-and-a-half years.

• This is my attempt to contribute to the process currently underway. I have not minced my words because I believe that to do so would do us, our leaders, and our shareholders a disservice, and because I believe that we are where we are to a degree because we have failed to examine our path sufficiently in the past.

• I apologize in advance to those of you whom I may offend as that is the opposite of my intention, and ask that you devote some portion of that energy to increasing the diligence with which you are already working to improve our remarkable organization. To those of you for whom some portion of my words may ring true, I ask that you declare your beliefs to those of your leaders and colleagues to whom you have not done so already, so that they may benefit from your perspective and suggestions the way we have benefited, enormously, from theirs.

Contents:

1) We Should Each Take a Stand
2) Our Leadership Positions Should Last Longer than Our Analyst Rotations
3) Do We Have a Vision?
4) Do We Know Our Purpose?

5) We Have Assessed Ourselves Inaccurately to Gain False Comfort in Our Inaction
6) Dear Abby
7) Our Task Is Urgent
8) This Is My Stand: I Renounce the PM Survey
9) Suggestions for Redesigning FMR

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General Research Note STRATEGY

March 13, 2005 ZANG JONATHAN 8-563-5930

WILL BOB DYLAN'S ANTHEM BECOME OUR REQUIEM?

We Should Each Take a Stand to Save FMR

" . . . the dialogue, whether visible or not, has to be constructive." – Abby Johnson, 2002

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was startled to realize we have tolerated many of the same long-standing concerns for at least the past eight-and-a-half years.

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Maximizing the Value of Fidelity Equity Research
Jonathan Zang
September 8, 1996
Fidelity Confidential Information

"The unexamined life is not worth living."

– *Socrates*, 399 BCE

I believe that we have never before had as much opportunity to improve as we do now, and should seize this irreplaceable moment before it escapes, and before we return to the same familiar path.

Contents:

1) We Should Each Take a Stand
2) Our Leadership Positions Should Last Longer than Our Analyst Rotations
3) Do We Have a Vision?
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5) We Have Assessed Ourselves Inaccurately to Gain False Comfort in Our Inaction
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1) We Should Each Take a Stand

- I think that if one believes we face an urgent need to improve and can add constructively to the process, one should. If those of us who believe our organization is malfunctioning do not contribute, we are arguably at greater cause of our condition than those whom we believe to be empowered but who do not appear to us to act. Our leaders choose their course believing that it is right, while we who choose inaction choose it believing we are on a path towards failure.

- None of us as a child lay in bed at night between covers and sleep imagining that we would one day become someone who did not try to help

when we believed that we could, or, imagining that we might one day accept a path towards failure to extract a few more years of gain to the detriment of those who may have arrived after us. Those of us with the perspective and experience to help correct our path and the resources to assume greater risk bear greater responsibility to attempt to utilize our capital to effect positive change.

- I believe that this is one of those rare, identifiable moments of greatest consequence when small contributions can have enormous impact. Unfortunately, I also think that there are already signs that the process underway is taking us down a familiar, fruitless path. I do not want to be the person I would become by choosing not to contribute now, and I would rather leave today after taking a stand than die a thousand more little deaths day by day. As always, I welcome your direct feedback, comments and suggestions.

2) Our Leadership Positions Should Last Longer than Our Analyst Rotations

- Why would an organization with as many resources as Fidelity maintain the same set of perceived impediments for so long? In part because we are successful and possess enormous opportunity, our success allows us to operate well below our potential for an extended time, the way a bright student might make passable grades paying attention in class, but completing little work beyond what is required. *We are successful by any*

standard, yet our performance and pace of improvement are still painful wastes of potential.

How to Sustain 40% Margins in a Regulated Industry

- When I asked LNCR's CEO whom he favored to replace the outgoing Medicare head last year, he said he didn't care who held the position, as long as the person in that role kept rotating every two years, because then Medicare would be unlikely to enact major home health care reforms that might harm LNCR's margins long-term.
- There have been at least 11 DOR's and Equity Heads during my tenure. I think that we are considering changes today in part because some of our current leaders' lengthening tenures in their positions are finally providing some continuity.
- *If PM's have routinely longed for longer analyst rotations, why have we not had managers in our important leadership roles who remain there substantially longer than an average analyst rotation? Why, even, have we not kept the best possible career or multi-year Equity Head and DOR's in these positions and empowered them to move our organization towards its long-term goals?*

"In addition, we are changing the GE culture by changing career expectations. We expect our people to spend more time in a business or on a job. Our teams are both excited and apprehensive about these changes. Here's how I see it. In a big company, people can be seduce by breadth. You can imagine a career where you could do, literally, everything. But then you end up accomplishing nothing. We owe it to our talent to teach them how to lead and grow businesses. This requires knowledge and time. In each business, we are creating 20 to 30 'pillar' jobs. These are key customer-facing or change-oriented assignments where the duration should be at least four or five years. With this time horizon, a leader can make his or her own bets and live with the consequences."

–Jeff Immelt, Letter to Stakeholders, 2004 GE Annual Report

3) *Do We Have a Vision?*

- An architect once taught me how to draw a straight line without a straight-edge: make a mark at the line's end-point and, starting at the beginning of the line, move your marker across the page while looking only at the end-point. The result is not only a very straight line compared to what one draws while focusing on the marker, but one which one can achieve with far less support
- In addition to providing continuity that enables an accumulation of perspectives and insights and the ability to shepherd change, a leader defines and communicates a vision for the future. I wonder

how many of us know what are our department's goals, or what is its vision for the future.

- I am more hopeful for our progress than I have ever been, but I am also concerned that we are traveling down a familiar path because we have failed to identify and resolve the structural impediments that have brought us to where we are and returned countless colleagues equally as capable to the same place again and again. We need our leaders to provide a vision that focuses our attention sufficiently ahead to enable us to examine our structural impediments, rather than merely the symptoms they engender.

We Should Empower Our Ideas, Rather than Our Limitations

- I admire Bob Chow for determining his price targets on stocks without first checking to see where the stocks are trading. If we recognize the potential benefit of rotating analysts for a fresh perspective, we should similarly ignore our current circumstances when charting a course to effect change.

- I have found frustration in some conversations with colleagues because some have defined their solutions within the context of what seems feasible based on our current condition. *Our vision and goals must be independent of where we are today, if they are not to be self-limiting.*

- Casinos make more money that they would otherwise because people set limits for how much they are willing to lose, but do not set goals for

when they will stop playing based on how much they might win. If our goal is still to be a best-in-class investment organization, we should be asking ourselves, "What do we want to build?" rather than, "What do we want to change?

- Great companies empower neither their considerations nor their present circumstances as determinants of their future.

> "We choose to go to the moon . . . not because (it is) easy, but . . . because that goal will serve to organize and measure the best of our energies and skills. . . ."
>
> —*John Kennedy, 1962*

We Should Respect Our Leaders by Holding Them to a High Standard

- Are there differences between investing money in a stock and investing years in a company? For which of these is identifying with a vision more important? *Which of us would invest where the CEO did not regularly enunciate their vision and strategy, or present clear evaluation metrics?*

- When we evaluate industries, people, or companies, progress matters more than speed: inflection points often drive powerful changes in valuation well before the pace of change accelerates meaningfully.

- *Defining and communicating our vision is more important than our timeframe for achieving it, because the act of defining it is the most important step to reaching it. Much of our current frustration derives from our lack of a unifying*

vision, which leaves us with no end in sight to our present condition.

- Public companies and mutual funds each seek differentiate investors from speculators. Our leaders' reluctance to communicate our vision will lead over time to Fidelity self-selecting speculators.
- Does it make sense that some of our most important functions are part-time positions? The roles of Equity Head and PM should both be full-time positions.
- We should hold our CEO, division heads, and DOR's to the same or higher standards as we hold their counterparts in the public companies in which we invest, and should respect our leaders enough to believe that they expect nothing less.

DOR GOALS
- CLEARLY ARTICULATE RESEARCH GOALS & PLANS
- LEVERAGE FIDELITY ASSETS FOR BETTER RESEARCH
- MENTOR ANALYSTS
- LEAD RESEARCH PROCESS
- EFFECTIVELY MEASURE ANALYST PERFORMANCE
- STREAMLINE COMMUNICATIONS MECHANISMS
- SHOWCASE BEST RESEARCH
- RECRUIT BEST PEOPLE
- CONTINUE TO IMPROVE TRAINING/ RESOURCES
- ENSURE PROFESSIONAL AND ETHICAL BEHAVIOR

Research Review, 11/02

	DOR GOALS
1	• Clearly Articulate Research Goals & Plans
2	• Leverage Fidelity Assets For Better Research
3	• Mentor Analysts
4	• Lead Research Process
5	• Effectively Measure Analyst Performance
6	• Streamline Communications Mechanisms
7	• Showcase Best Research
8	• Recruit Best People
9	• Continue To Improve Training/Resources
10	• Ensure Professional And Ethical Behavior

Research Department Review, 12/03

"The Red Cross said publicly 13 months ago that the system of keeping detainees indefinitely without allowing them to know their fates was unacceptable and would lead to mental health problems.

–The New York Times, 11/30/04

4) Do We Know Our Purpose

Is Our Purpose to Have a Business Model?

- *Our current system is a relic that institutionalizes incentives to provide information to PM's as quickly as possible, but fails to reflect the changes since Peter Lynch's method of overturning the most rocks was sufficient to sustain an advantage for a large investment organization.* Peter's statement concerning turning over the most rocks reflects a belief that information is a store of value and obtaining the most information will produce the most value. Information has

progressed beyond being a commodity to the point where most marginal information today is a detriment because the time needed to collect and process it often leaves time for little else. Our department is a microcosm of this phenomenon.

MEASUREMENT, REWARDS FOR PERFORMANCE, ADVANCEMENT OPPORTUNITIES

Research Department Review, 12/03

Why is this our business model and how do we know it is the best model for shareholders?

MEASUREMENT

- BASIC PREMISE – balance of qualitative and quantitative, with prior input as the most important variable (consistent with our business model)
- BASIC PRINCIPLES – needs to be fair, thorough, consistent

- I think the value of information today derives less from obtaining it than from knowing how to differentiate between important and unimportant pieces of it, the latter of which vastly outnumber the former, and from learning over time how to form connections across disparate pieces of information to transform them into knowledge.
- *When PM's vote for analysts in much the same way they vote for the Street, it should not surprise us that each resource provides similar information that is often undifferentiable in value.* If our

"basic premise" is to remain "consistent with [this] business model," rather than measure and reward what may actually yield value for shareholders, we are likely to remain closely wed to consensus.

Is Our Purpose to Accept and Institutionalize a Belief that Analysts' Positions are Inferior?

- Our analysts and PM's are separate and unequal. This separation runs deep, and harms us and our shareholders: during the seven-and-a-half years of my tenure, we have segregated between PM's and analysts all inward-looking meetings examining departmental concerns.
- Why do our leaders advance the belief that the definition of advancement is becoming a diversified PM? Why do we condition ourselves to accept the idea that analysts are "stuck" in their jobs and that the analyst's position is inherently undesirable? We have consistently avoided discussing what may actually cause discontent
- *The analyst's job is an outstanding position that we disparagingly recharacterize by virtue of the conditions we choose to place around the position that are themselves objectionable.* I enjoy being an analyst. I did not want to rotate my research coverage. And I do not want to be a diversified PM at Fidelity any time soon. And what is more remarkable than that I am still here, is that there are many other analysts to whom I have spoken, some of whom have not yet left Fidelity, who would feel similarly if not for our current hierarchical system.

QUESTIONS AROUND GROWTH & SIZE:

- Have we seen dis-economies of scale? Communication, narrowness of analyst assignments, perception of bottlenecks to advancement ("too many of them")

Research Department Review, 12/03

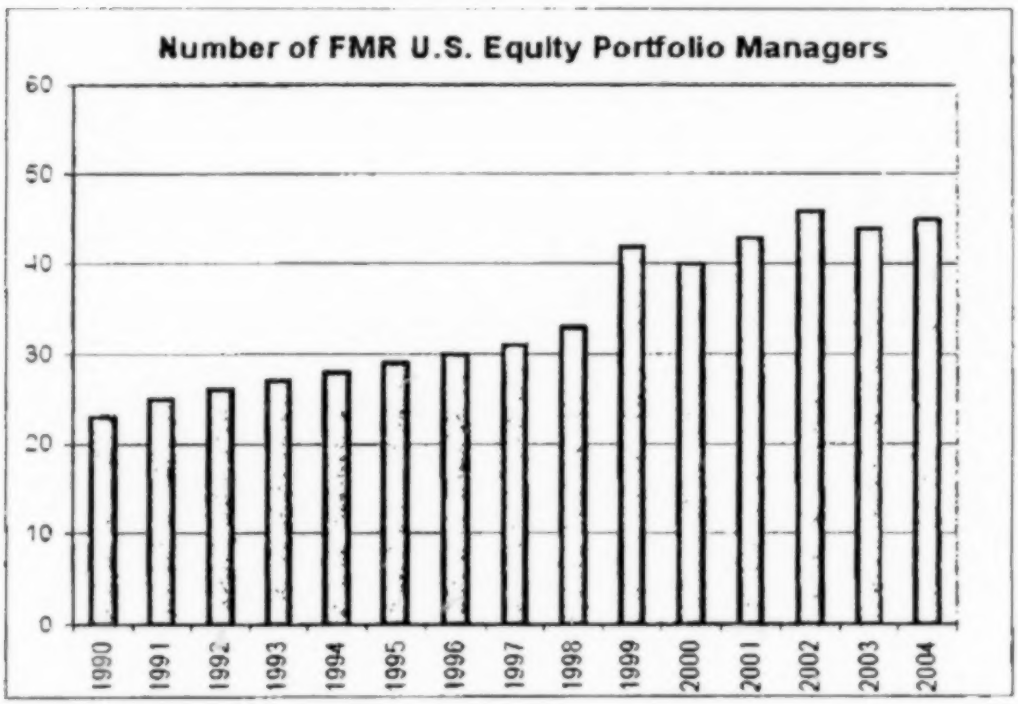
- We are now up from the very low 8 month average tenure at this time last year, without having analysts "stuck" extra-long on their coverage – many ways to continue to manage this:
  - More layering of assignments
  - Reuniting fragmented assignments
  - Natural benefits from lower growth in people in recent years and going forward

Research Department Review, 12/03

Is Our Purpose to Grow Our Number of Portfolio Managers?

- "Promoting" more analysts or "promoting" analysts faster will not solve our problems; in fact, it will make them worse by making the jobs of the remaining analysts more difficult, which in turn further diminishes the value of our research.
- We must break out of this vicious cycle and away from the mindset that the transition from a Select fund manager to a diversified fund manager is a promotion. In a bottoms-up shop, one could even argue the reverse.
- If analysts are not at least equal in their responsibility to generate returns for shareholders,

PM's would not stir when an analyst is unavailable during an unexpected event affecting one of the companies that a PM owns. Moreover, if FMR is still a "bottoms-up" shop in practice rather than in name only, why do we not have analysts managing larger pools of money . . . as I am told we once did, when the distinctions that separate us were not as severe?



Research Department Review, 12/03 & Research Review 12/02

Is Our Purpose to Increase Market Share?

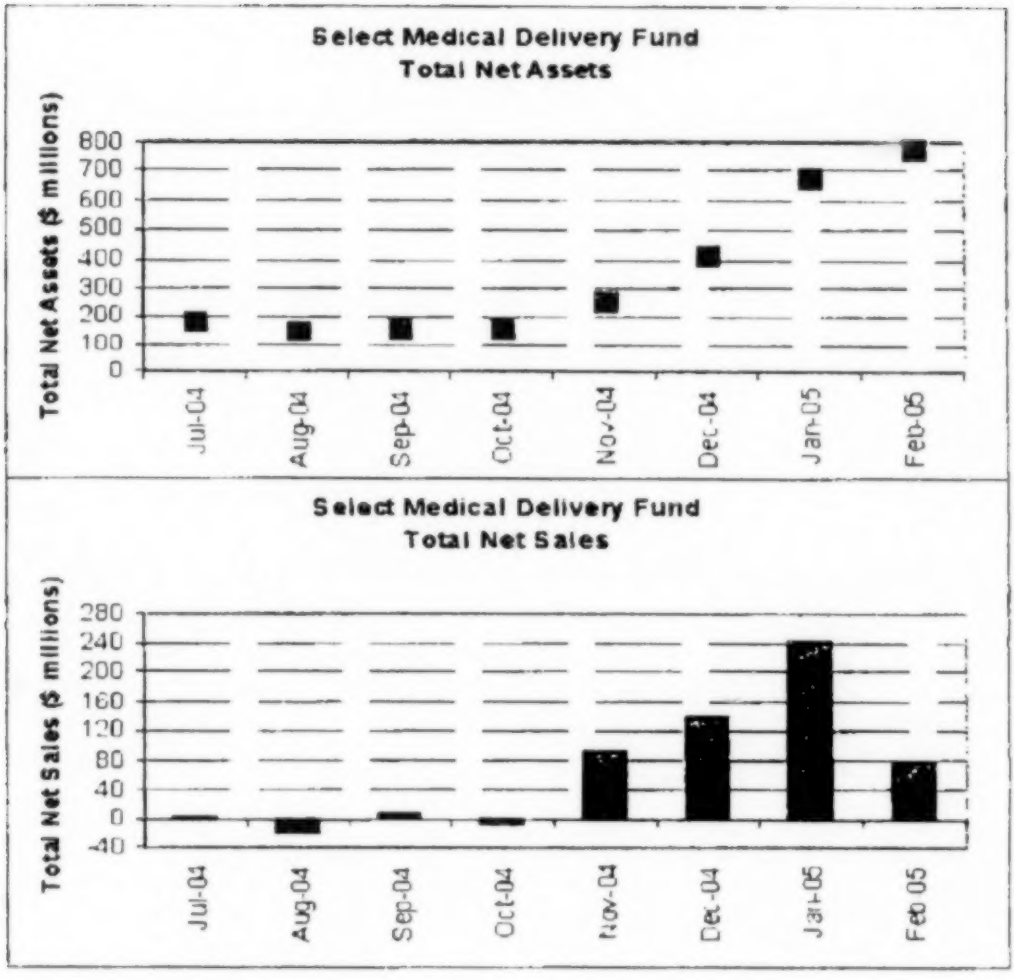
- Companies with outstanding performance do not regularly need to argue for higher multiples. Rightly or wrongly, assets follow returns, and, depending on one's view, the market is either largely efficient or inefficient in this regard.

- Without a single advertisement, sales of the Select Medical Delivery fund quadrupled the size of the fund after valuations for managed care stocks expanded following last year's Presidential election, boosting the fund's return.
- We are fortunate to possess a breadth of fund offerings that leads many outside Fidelity to market our funds for us on our behalf. If anything, our marketing expenses should be lower than those of our peers, rather than higher.

We receive updates on our market share during at least 12 department meetings a year, but seem unwilling or unable to provide a forum even once a year to discuss the important tenets of our vision and our progress implementing them.

If we have great returns and maintain our favorable corporate reputation, market share will follow. Market share should be our result, rather than our goal.

> "[In 2005, our] goal is to gain market share within all market classes"
>
> *–Abby Johnson, Management Update, FMR Co Pre-Directors Meeting, 12/14/04*



Is Our Purpose to Ensure that We Get Our Best Ideas into Our Largest Funds?

The billions of dollars in our Select funds are no less important to our shareholders than the hundreds of billions of dollars in our other funds. We have deemphasized the importance of our Select funds only as a way to compensate for the inefficiencies and backward incentives that have become our current structure. *We have debased our expectations for our PM's to such*

an extent that we now prioritize pleasing them over generating returns for shareholders.

Fidelity's interests and those of our shareholders in our largest funds are perfectly aligned with the goal of generating the best possible returns in our Select funds, consistent with the Select funds' original, primary purpose, because if that were to happen, our diversified funds would have to follow. If this is already our goal, we should align this goal with our incentives in a way that withstands public scrutiny, without relying on disclosures our attorneys may deem "technically correct," but which portray inaccurately the relative importance of compensation drivers.

Each sector fund manager's base salary is determined primarily by level of responsibility and performance as a research analyst and *sector fund manager* at FMR or its affiliates. A substantial portion of each sector fund manager's bonus relates to his or her performance as a research analyst and is based on portfolio manager survey-based ratings that relate to analytical work and investment results within the relevant sector(s) and impact on other equity funds and accounts as a research analyst. *Each sector fund manager's bonus is based on* several components over a one-year period for research performance, and over a one-year period (and, if longer than one year, an additional period relating to tenure on the Select fund) for *Select fund performance. Additional components of each sector fund manager's bonus are based on (i) the pre-tax investment performance of the Select fund relative to the S&P 500 Index, a Goldman Sachs sector index*

(identified below for each Select fund above) and additional industry benchmark indices developed by FMR, if applicable, and (ii) the investment performance of a broad range of FMR equity funds and accounts. *The Director of Research may also take into consideration the performance of the Select fund relative to sector peer groups of funds,* if relevant. Another component of the bonus is determined by the Director of Research based on the sector fund manager's contributions to the research groups. Each sector fund manager also is compensated under equity-based compensation plans linked to increases or decreases in the net asset value of the stock of FMR Corp., FMR's parent company. FMR Corp. is a diverse financial services company engaged in various activities that include fund management, brokerage, and employer administrative services.

Fidelity Select Portfolios Prospectus, 2/18/05

5) *We Have Assessed Ourselves Inaccurately to Gain False Comfort in Our Inaction*

• Because we have lacked empowered leadership, it has been easier for us to assess ourselves inaccurately than acknowledge our condition and confront our urgent need to improve. A highly empowered DOR who does not report to PM's should use subjective measures as one input alongside accurate and objective performance metrics. We have, instead, allowed our institutional bias against analysts to influence our interpretation of inaccurate performance metrics, enabling us to ignore the distinction

between generating and capturing research ideas and our lack of any system for weeding out pm's.

- KEY TAKEAWAYS:
  - GOOD CHECKS AND BALANCES, YET RARELY SEE LARGE OR SUSTAINED INCONSISTENCIES AMONG THE MAJOR INPUTS.
    - Top 10 in metrics have average pm scores about 1 standard deviation over median; bottom 10 are about the same amount below median.
  - ALIGNED WITH WHAT BENEFITS OUR SHAREHOLDERS,
  - EXCEPTIONALLY THOROUGH

12/03

- Without an adjustment for industry volatility, the PM survey *may* identify successfully the tails of the distribution of analysts, but we need to be right more than 20% to 30% of the time. It is easy, for example, for a college admissions officer to recognize potential in a child of immigrants who would be the first in his family to attend college, but differentiating among advantaged applicants with strong test scores requires greater skill. We must not judge any system a success because of its ability to discern outliers, any more than we should congratulate an admissions officer for admitting an applicant who will inevitably appear in a fundraising appeal in the college's alumni magazine.

• To assume that the PM survey successfully differentiates the majority of analysts does our shareholders and ourselves a disservice: for our self-assessment to be authentic, we need to evaluate our performance using measures that do not themselves influence what we are trying to measure. Moreover, we now have evidence that the PM survey harms shareholders (see below). [For those who are interested, analyst turnover in 2004 was 35%, or 18 analysts: 28% due to departures (14% to positions outside Fidelity and 14% to positions within Fidelity), and 6% due to "promotions" to PM.]

TURNOVER OF PEOPLE since 1995:

For analysts:

- Due to departures has ranged from 7% (1998) to 15% (1997)
- Due to promotions to pm has varied from 6% (1999) to 17% (1997and 1998)
- For analyst departures, performance prior to departures has consistently been significantly below department median levels.

Research Department Review, 12/03

• Every other chart in the "Research Department Review" perpetrated inaccuracies in their interpretations of research metrics. Research value-added has declined, but *it is nearly impossible to derive useful insight from our existing metrics as to why, and we should be loathe to believe that we can merely tweak them to reinvent ourselves or obtain more useful*

insights into our performance. (I would be happy to provide additional details concerning inaccuracies in our prior self assessments to those who are interested.)

- *Metric taskforce*: I've heard from a number of people on the metrics taskforce that their mandate is more limited that they originally believed, and that their recommendations may or may not be implemented.

- If our desire to improve is genuine, we should set our goals for improvement without regard to our current limitations. If we do not, we are empowering our current limitations to become our future limitations, and are unlikely to improve more over the next eight years than we have over the past eight years.

TASK FORCE ON ANALYST METRIC REVISIONS
February 2005

QUESTIONS TO CONSIDER:

1. other views of stockpicking performance?
2. metrics all still based on stock ratings 1-5?
3. detailed questions – composition of "custom universes", timeframe for active ratings, handling coverage transactions, cumulative vs. single-period emphasis, etc.

Departmental email regarding analyst metrics task force, 2/15/05

Would You Continue Participating in the PM Survey if You Knew it Harmed Our Shareholders?

- If you could fill the research department with either of two groups of analysts, which would you choose: 1) those who consistently receive 2's from every PM, or 2) those who consistently receive 1's from half the PM's and a mix of 3's and 4's from the others?

- This is not a hypothetical question. In the above example, the PM survey would consistently rate the second group of analysts below-average, the DOR's would counsel them to improve, and they would receive lower salaries, bonuses, and share awards as a result. They would also on average receive "less important" research assignments. *Every PM to whom I've asked this question said they would choose the second group of analysts to help them make money for shareholders. If we want to retain the analysts in option 2, why do we use a system that weeds them out?*

- What is the difference between a survey that penalizes the latter group of analysts for being "below-average," and restricting Neal Miller to only those subscriptions that at least half of his PM colleagues also read? Or, if our PM survey is effective at deciding which tools PM's may use to construct their portfolios, should we also inform Joel that he may only own stocks that at least three other small-cap PM's at FMR agree to hold in their funds?

"In order to be irreplaceable, one must always be different."

–Coco Chanel

• *Consensus In, Consensus Out*: We are each devoting a significant portion of our careers to an industry where, net of fees, consensus thinking does not add value over time. If we each embarked on this path driven in part by the essential belief that we could excel versus consensus, why do we sustain structural drivers that unyieldingly conform us to consensus? The PM survey succeeds in providing incentives to disseminate information as quickly and in as many forms as possible, but this has not been the way to win this game for a very long time.

"When all think alike, no one thinks very much." – Lippman

Research Department Review, 12/03

• I do not know how typical any PM surveys may be but can point to my own experience to exemplify how frustrating our current system is, and how it harms shareholders. In my Fall 2004 evaluation alone, there were four separate areas where PM's provided distinctly opposite feedback concerning my professional skills.

WHAT THE ANALYST DOES WELL	WHAT THE ANALYST CAN IMPROVE
Analysis and Communication	
Jonathan provides a well thought out investment thesis and does an excellent job of communicating his ideas. . . .	
Jonathan's views . . . are well thought out . . . He has also been extremely responsive and good at walking through complicated issues. . . .	I don't need all the details – which are the critical ones?
Strong analysis and communication.	Focus on 2 big points; be less nuanced.
Conviction	
Has conviction in his recommendations, sticks with them even when there is controversy and has non-consensus earnings estimates.	Keep an open mind.
I really appreciate the discussions I have with Jonathan, and that he takes strong stances on the stocks and his industry.	Keeping open to different styles.

He takes a stand. Thank you.	Jon is not afraid to take a controversial position on a stock, but I have found him to be somewhat dismissive of dissenting views.
Willing to pound the table.	
Great conviction. . . .	
Like the intensity and the independent analysis. . . .	
Clear where he stands.	
Making Money	
Jonathan has made me money on stock selection.	A lot of ratings changes in the period. The numbers were very weak. . . .
Money maker!!	
Leveraging Ideas Across Sector	
Your peers particularly your teammates on the health care team appreciate your willingness to talk about issues in your sector and those affecting other groups. They note your company and industry work as being detailed thorough. [DOR Assessment]	Needs to work more closely with the other health care team members to work through which parts of health care are going to be the most subject to risk from the adoption of HSAs.

Portfolio Manager Survey, Fall 2004

- PM's who believe that non-consensus views can add value need to recognize that our structure discourages this. In the year-and-a-half before the last PM survey, I genuinely worked as hard as I was able to "get my best ideas into the funds" of every PM, without regard for the strength or lack thereof of our relationship. I know that our system does not work because, despite my authentic best effort, some PM's were still unaware of, or did not have enough time to investigate, the value I was attempting to build with them.

Fall 2004 PM Survey	
PM weighted overall rating:	2.30
Median	2.05

Cap Weighted Results for the 1-Year Period from 9/30/2003 to 9/30/2004 (Performance Measured in USD)

Stocks vs. S&P 500 TotReturn

The cumulative total return of the S&P 500 Tot Return during this period was 13.87%

ZANG JONTHAN

Number of Companies Actively Rated During this Period (with Caps and Returns found in FAME): 28

RTG	# Secs at Rtg	# Rtg Periods at Rtg	Days at Rtg as Pct of Total Days in Entire Portfolio	Cap at Rtg as Pct of Total Cap in Entire Portfolio	Computed Perf of Portfolio Over Period	Computed Perf of Index Over Period	Rel Rtn (Portfolio Minus Index)	Pct of Trading Days Used In Period	Rtg Accuracy
1	5	6	9.04%	26.75%	40.77%	13.87%	26.90%	100.00%	83.33%
2	20	31	45.17%	28.96%	17.58%	13.87%	3.70%	100.00%	54.85%
3	7	11	12.28%	15.33%	11.75%	8.70%	3.05%	83.61%	
4	18	26	29.81%	28.07%	11.20%	13.87%	-2.67%	100.00%	42.31%
5	1	3	3.71%	0.89%	-40.76%	16.41%	-57.17%	80.33%	66.67%
SUMMARY	51 (3's Included)	77	100.00% (3's Included)	100.00% (3's Included)	28.24% (3's are EXCLUDED from the 3 calculations above)	13.87%	14.37%		55.03% (3's EXCLUDED)

Metrics (Included Analysts and Associates; New People Excluded; If <4 People in Grp, Statistics Do Not Appear)

VALUE ADDED OVER PERIOD (Note [illegible])

Value Added		Rtg Accuracy	
1st	40.15%	1st	68.97%
2nd	21.90%	2nd	65.75%
3rd	18.07%	3rd	62.16%
Mean	1.11%	Mean	50.26%
Median	2.51%	Median	51.34%

Absolute Rtn of Buy Portfolio (with 50% Premiums for Rtg of 1)	34.72%
Absolute Rtn of Sell Portfolio (with 50% Premiums for Rtg of 5)	6.98%
Avg Cap Weight in Buy/Sell Portfolio:	34.20%

- Our PM's are not at fault for my "below-average" evaluation on the PM survey any more than I am to blame for the inability of some of our funds to capture value from my research in 2003 and 2004. *We and our shareholders are instead victims of the structural inertia that is born from our long-term lack of empowered leadership.* We have failed to assess adequately our condition in the past, have become too accustomed to its failings as a result, and have lacked an empowered leader to focus our attention on the endpoint we want to achieve.

- Should you want to console yourself that my experience must be unique, please first reconsider a slightly different form of an earlier question: which group of analysts would you as a portfolio manager rather have helping you make money for your shareholders: 1) a group of analysts who do well on the PM survey, or 2) a group of analysts who add value in ten out of ten sectors of the market? *Unfortunately, this too is not a hypothetical question. We have already made our decision, and our choice was option 1.*

Can We Learn from the Shame of Institutional Equity Group (IEG) Recruiting?

- IEG recruited sector analysts from the Equities Department in January 2004. Its pitch was that it was targeting research analysts with above-average quantitative or Select fund records and below-average PM survey scores, and that IEG would only care about stockpicking results. I and the other analysts

with whom I've spoken that IEG targeted all heard the same pitch.

- We and the shareholders of our diversified funds will never know what impact IEG's "raid" may have had last year and might have in the future, but we can, thankfully, clearly see the impact on IEG's institutional accounts. *In its first year, IEG's sector-neutral S&P 500 product outperformed in ten out of ten sectors.* As shown below, total return in a typical account during the one-year period ending February 28, 2005 was 16.53%, versus 6.97% for the S&P 500.

03/04/2005
14:23:16

Attribution Summary (MSCI/S&P Sector)

Benchmark: S&P 500 Index
Mar 1, 2004 to Feb 28, 2005
Actual View

	Average Weight (actual)			Cumulative Return[2]			Contribution to Relative Return[2,5]		
Market	Fund	Bench-mark	Relative	Fund	Bench-mark	Relative	Security Selection	Market Selection	Total (actual)
Information Technology	16.08%	16.27%	-0.19%	7.80%	-2.95%	10.75%	170 BP	12 BP	182 BP
Energy	6.71%	6.92%	-0.21%	78.66%	51.57%	27.09%	138 BP	-2 BP	136 BP
Health Care	13.12%	13.19%	-0.07%	5.31%	-1.94%	7.25%	51 BP	57 BP	108 BP
Financials	20.22%	20.69%	-0.46%	6.54%	1.88%	4.65%	86 BP	19 BP	104 BP
Consumer Staples	10.87%	11.02%	-0.15%	12.36%	3.50%	8.85%	104 BP	-4 BP	100 BP
Industrials	11.05%	11.39%	-0.33%	23.16%	15.40%	7.76%	80 BP	-5 BP	75 BP
Telecommunication Services	3.44%	3.46%	-0.02%	26.22%	5.44%	20.78%	75 BP	-1 BP	74 BP
Utilities	2.87%	2.84%	0.03%	54.33%	24.18%	30.15%	71 BP	1 BP	72 BP
Materials	3.18%	2.99%	0.18%	34.36%	18.18%	16.18%	55 BP	10 BP	65 BP
Consumer Discretionary	10.95%	11.22%	-0.27%	11.43%	6.67%	4.75%	-8 BP	62 BP	54 BP
Total Primary Assets	98.50%	100.00%	-1.50%	16.86%	6.97%		821 BP	149 BP	970 BP
Cash	1.50%	0.00%	-1.50%	0.97%	0.00%	0.97%			16 BP
Other Investments	0.00%	0.00%	0.00%	0.00%	0.00%				1 BP
Expenses/other									-0 BP
Total	100.00%	100.00%	0.00%	16.57%	6.97%				956 BP

Reporting Currency: US Dollar

Published Fund Return[4]: 16.53
Published Benchmark Return[4]: 6.98

[1] Average Weights are scaled-up by fraction of primary assets to equal 100%
[2] Cumulative Time-weighted Return
[3] Contributions are based upon rescaled average weights
[4] Published returns are stated by the Performance & Data Policy Group
[5] Contributions are calculated at MSCI/S&P Group level.

- *The ultimate irony is that IEG only approached analysts whom the DOR granted permission to recruit*, per IEG. The deciding factor for the Equity Department, presumably, was our below-average PM survey scores, whereas the deciding factor for IEG was demonstrated stockpicking ability during our careers at Fidelity.

- If we say we want option 2, why do we repeatedly choose option 1, and which better aligns with shareholder value? *We have "succeeded" between Fall 2003 and Fall 2004 in improving the average PM survey score from 2.25 to 2.05. I suspect this would be of little solace, however, to our shareholders.*

Why Do We Have So Many 2's?

- *It should not be a mystery why we have so few 1's and 5's, "too many" 2's, and earnings estimates on average that closely follow consensus. This is a natural outgrowth of our PM survey and our current incentive structure.* Analysts for whom there is not a consensus view on the PM survey receive smaller bonuses, salary increases, and share awards than those for whom there is a consensus view. Analysts who do not leave FMR, and who survive and are "promoted" to PM, do so by pleasing every PM to the greatest extent possible. If a politician wants to pass a controversial bill, a politician moves towards consensus.

- I have been told in nearly every review I've had that many PM's admire my high conviction on some

stocks as a valuable trait, but that some PM's regard me as not sufficiently open-minded. How many men are there who are both strong and sensitive, kind and charismatic, successful professionally yet home at 5:00 p.m. and on weekends, and athletic and book-smart, let alone unmarried? And how many of their analyst-equivalents can we realistically expect to find and retain as research analysts? And, if this is our standard for research analysts, is this our standard for PM's?

- Finding analysts who can successfully please the vast majority of PM's is not nearly as difficult as finding analysts who can do this while persistently remaining sufficiently independent of consensus thinking to make money with their research over the long-term. If we retain the PM survey in its current implementation, we should acknowledge that we prefer pleasing the consensus to thinking independently, and should resign ourselves to having "too many" 2's and very few 1's and 5's.

Department Turnover Since January 2004	
Analysts (including 4 "promotions" and 1 DOR)	21
Portfolio managers	1

- Our research on average follows the consensus because we run our department by consensus. Our treatment of analysts is no different than our lack of long-term, empowered leadership in the DOR and Equity Head positions; it is why research falls under

PM's, and why historically it has been difficult to discern if PM's fall under someone who is empowered. We should recruit disinterested professional leaders and empower them to break us free from our obligatory consensus condition.

If you were forced to choose between: 1) our current hierarchical system, or 2) having more 1's and 5's, fewer 2's, and more divergent earnings estimates, which would you choose? I believe that this is in fact our choice. Will we only think or say option 2 while continuing to choose option 1? Or will we actually choose and adopt option 2? *There is no mystery here, other than why an organization as great as ours consistently chooses option 1, despite knowledge of its harm. And this is more tragedy than mystery.*

6) Dear Abby

- How can I urge others to share their thoughts if I am unwilling to do so myself? I have limited direct experience with you, but I have had enough conversions with PM's, analysts and others who believe that to debottleneck our progress we must make progress with you, that I now share this belief.

- I reluctantly place your name in print because I share with many others concerns about the longevity and severity of our condition. Additionally, I believe that anyone in your position would want to receive this notice if its author believed it might help direct us towards further improvement. I regret the mutual

temporary embarrassment this may cause, but accept this risk hoping to support others in their willingness to express similar concerns, and believing that beyond our personal discomfort we might accelerate our progress. (Or, if our current condition is a conscious, proactive choice, my hope is that we may discern this so as to choose either to make peace with our direction, or direct our careers accordingly.)

- My request of you is disarmingly simple: though some may disagree with my method, please ask the future leaders of your company, with whom you may or may not be regularly conferring today, for their opinions of the substance of these concerns, and our current condition and direction.

- Should you take offense to my request, please appreciate that I choose my actions out of a desire to confirm your awareness of what I believe is our path. Should you discount what I raise, I can only ask that you ask those whom you have not asked before, and actively seek dissenting opinions, so that you may increase your conviction in our path if you do not hear anything that you have not considered before. When my recommendation of acute care hospital stocks began to go against me on October 28, 2002, my hubris was too strong for me to listen sufficiently to those with whom I disagreed, and we suffered the consequences. This was an important lesson, because when I next found myself with a similar level of conviction, instead of turning away from those whose opinions were different from my own, I actively sought them out, and did in fact redouble my conviction in

my recommendation as a result, and our shareholders benefited significantly.

> "CEOs cannot delegate growth or customer satisfaction. I try to spend at least five days each month with customers or being otherwise involved in the selling process. . . . And twice each month I do 'town hall meetings' with several hundred customers to share ideas on the direction of GE and listen to their thoughts on what we can do better."
>
> —*Jeff Immelt, Letter to Stakeholders, 2004 GE Annual Report*

- To my colleagues, I ask that if you share a concern that those with the ability to empower improvement may not recognize the extent of reinvention we must undertake, the urgency with which we must define our vision, and the need to communicate this clearly and broadly to those who collectively must effect it and stand behind it, please say so candidly when someone else with the power to effect change asks you for your opinion; and if no one asks you, please listen and reply to that as well.

- If you are one of the many who wonders if Abby is "too insulated" behind those who may not recognize the severity of our condition or who may themselves be so insulated, please let her and them know. If you are one of a few who at times "hope" for our condition to "worsen" because you so admire our company that you would rather endure upheaval to survive strengthened than witness us slowly become unrecognizable, please tell her. If we don't, we are more culpable.

7) *Our Task Is Urgent*

- I know from personal experience the urgency of our task. Many considered me uncooperative for years but tolerated me because I added value more often than not, but when my "Buy" on hospitals failed, my own valuation cratered faster than a high-yielding stock that cuts its dividend.

- We must ask ourselves to what extent our retail asset flows are due to our performance, or because investors are partial to our web site and connect with our advertising, or because we are a convenient, known safe-haven among peers with deteriorating reputations. And we should consider what will happen to our assets under management if we are drawn further into industry scandals, and whether our marketing or our web site would then make a difference. Our primary dividend now is our reputation, but *as a collection of thousands of individuals amid a tightening regulatory environment, we may be no more than one or two conditional probabilities away from the catastrophic loss caused by a frozen O-ring.*

> "[We] want to think about what's important, but have to deal with what's urgent."
>
> *–Abby Johnson, Management Update, FMR Co. Pre-Directors Meeting, 12/14/04*

AG Riley to Fidelity: Return Fees for Veiled Index Funds

–Boston Herald, xx/xx/05?

Fidelity Dismisses Itself As 401(k) Investment Manager

–The New York Times, xx/xx/05?

- In an environment where settlements routinely arise after following the law, and standards may be redefined retroactively, to what extent will the difference between actual and apparent matter to our shareholders if our reputation slips further, and, after witnessing the consequences elsewhere in the industry, to what degree are we willing to rely on the answer by minimizing or delaying our re-engineering? We have already disciplined 40% of our equity trading professionals. We should be asking ourselves, how lucky do we feel from here?

- IEG began only a year ago organized around a unifying goal, recruited strong analysts, and already has outstanding results. Our department during this same time "widened the gap vs. our competition" as we proposed, but not in the way we intended.

- We should evaluate our progress towards our priorities since November 2002 and prior years, and assess honestly if we are on a path that is likely to yield results. If we are not, we should follow our own advice, "admit that we have failed," and "try another

method." Our leaders need to define their vision, and have the power and means to effect it

TAKEAWAYS | Research Review 11/02

Analysis as an instrument of enlightenment and civilization is good, in so far as it shatters absurd convictions, acts as a solvent upon natural prejudices, and undermines authority, good, in other words, in that it sets free, refines, humanizes. . . . But it is bad, very bad, in so far as it stands in the way of action, cannot shape the vital forces, maims it at its roots. Analysis can be a very unappetizing affair. (Thomas Mann)

Take a method and try it. If it fails, admit it frankly, and try another. But by all means, try something. (Franklin D. Roosevelt)

KEY PRIORITIES:

- RESEARCH
  - TOP DOWN:
    - More quality, less noise
    - Greater breadth of coverage
    - Longer tenure on assignments with ongoing opportunities for changes & advancement
  - BOTTOMS-UP:
    - Continued acceleration of pm involvement in research
    - Improvements in time use:
      - More analysis, less reporting

    - More investment dialogue, less fact-shuffling
  - Leveraging our site
- MANAGEMENT:
  - Communication
  - Continued provision of excellent resources, with more proactive matching to needs
  - Clarity and consistency of performance measurements & decisionmaking
  - More differentiation of rewards for great performance – both $$ and opportunity

THIS IS THE TIME TO REALLY WIDEN THE GAP VS. OUR COMPETITION – THE TIME TO PROVE THAT WE ARE DOING THE BEST WORK, AND THE MOST WORK ON BEHALF OF OUR SHAREHOLDERS.

8) This Is My Stand: I Renounce the PM Survey

- The PM survey in its current form and implementation destroys value by giving PM's false confidence in their ability to differentiate and capture value from analysts, and by disguising analyst evaluations for all but outliers and our least-experienced analysts as meaningful. The survey exists because each of us, analyst and PM alike, agrees to participate in it. To continue to participate in it when it harms shareholders is to endorse its use. We must strengthen significantly the alignment between our incentives

and shareholder value. *In light of the evidence of tangible harm that the PM survey in its current form does to shareholders I can no longer in good conscience acquiesce to the use of the PM survey on my behalf, and I renounce my allegiance, to it completely.*

- Beyond an initial period of evaluation that is administered by an empowered DOR, a 360-degree peer survey that is of equal importance to all its participants can be useful to elevate corporate values, but the PM survey as it is currently applied is not that. Our lack of an approved substitute cannot be sufficient reason to enslave ourselves to a process which we know destroys shareholder value; we must trust our leaders to formulate an evaluation process that benefits shareholders, and respect our leaders enough to hold them to this minimal standard.

- *If you were inclined to rate me favorably, I ask that you instead abstain,* and, if you agree with my stance, I ask you to consider abstaining for all who are beyond an initial period of evaluation. If you and I have agreed that you will evaluate me based on the performance of a specific recommendation over a specific timeframe (which agreements have all since inured to my benefit), *I ask that you convert your pledge to rate me a '1' to a pledge to abstain from providing any rating on my behalf.*

I recognize the inherent difficulty of my request, but ask PM's to look beyond what they may perceive to be in their own self-interest: our current hierarchy does little to help those PM's who consistently perform

well, while institutionalizing in perpetuity the authority and consumption of resources of those who consistently do not. By elevating the level of noise in our department until it is indistinguishable from the din of the Street, the PM survey harms all. Amid clear evidence that the PM survey harms shareholders, each of us who agrees to participate in its use agrees to endorse and bear responsibility for its outcome. In a vacuum, a few working in unison constructively can make a big difference. It requires only a few of as now to choose, declare, and enact this stand to move us towards "option 2".

- *Please place the attached symbol outside your office if you are willing to take this stand with me or express your support for the abolition of the PM survey in its current form in favor of evaluation tools that demonstrably benefit shareholders.*

9) *Suggestions for Redesigning FMR*

- The most important thing we can do is eliminate the destructive hierarchy between PM's and analysts. A PM is not a fattened *frois grois* goose; force-fed with a funnel down its throat and feet nailed to a board.

- *When PM's vote for analysts in much the same way they vote for the Street, it should not surprise us that each resource provides similar information that is often undifferentiable in value, and that each consumes vast amounts of our limited time that we desperately need for more constructive dialogue.*

- Our hierarchy induces analysts to seek shorter rotations, reducing our chances of being right at critical inflection points which by definition are the most difficult to discern correctly and which hold the most potential for gain or loss; unnecessarily pressures us to create more PM positions, in turn increasing the challenges our remaining analysts face, and moving their evaluations further towards consensus; wastes enormous amounts of time and energy spent creating and responding to the duplicative dissemination of research ideas that are increasingly necessary to gain sufficient notice above our noisy department; promotes the purely subjective evaluation of analysts; crowds out thoughtful, in-depth knowledge sharing; breeds discontent in an industry that attracts us in part because of its ability to provide unbiased, objective feedback; and ultimately excludes from our organization those who may generate outstanding shareholder value as analysts, but who may wish to remain analysts or be undifferentiated as PM's.

We Should Organize Ourselves Around Our Purpose

- As some PM's have implied to me in their comments on the PM survey, the most compelling thesis reduces to a few simple yet powerful points. IEG appears to have organized itself around this principle, and we should be able to do the same over a comparable period and with similar results. Because our tendency when looking forward has been to anchor

ourselves in our current condition, we may need external help.

- *(I would be happy to share my specific suggestions concerning analyst/PM communication, research value capture, analyst rotations, industry transitions, industry tenure, PM training, metrics, and compensation with anyone who is interested.)*

Fidelity's size

- Some portion of the recent performance degradation may be explained by the increased speed with which ratings lose their predictive value.
- Because if our size, even the largest cap stocks are not immune to concerns about liquidity.
- There is an increasing disconnect between analysts' research and the implementation of ideas at the portfolio level.
- It is unlikely that fresher ratings alone, therefore, are enough to improve portfolio performance.

Maximizing the Value of Fidelity Equity Research, September 1996

"[Our] two key points [in 2005 represent] no change, help portfolio managers find ideas, and grow future portfolio managers."

–John McDowell, Management Update, FMR Co. Pre-Directors Meeting, 12/14/04

"The times, they are a-changin!"

–Bob Dylan, 1964

Today's dialogue provides more opportunity for improvement than we've had in the past eight years. Will we improve significantly over the next eight years? If the possible answers are "yes" and "no", which would be more surprising? *Our challenge, our opportunity, and our imperative is to resolve that Bob Dylan's refrain reflects in earnest our forward path, rather than another iteration of an unchanging strategy.*

* * *

AFFIDAVIT OF ETHAN DAVIS, EXHIBIT 3

Filed in *Zang v. Fidelity Management & Research Company, et al.*, United States District Court, District of Massachusetts (Boston)

Case No. 1:08-cv-10758-DPW

June 6, 2008

U.S. Department of Labor
Occupational Safety and Health Administration
J.F.K. Federal Building, Room E340
Boston, MA 02203
Telephone (617) 565-9860 [SEAL]
Fax (617) 565-9827

Reply to the Attention of: /OSHA/BOS/EPTS

February 1, 2007

Marc Freiberger
Shilepsky O'Connell LLP
225 Franklin Street
16th Floor
Boston, MA 02110

Re: FMR Corporation, et al/Zang/1-0120-05-016
Section 806 of Sarbanes Oxley Act of 2002

Dear Mr. Freiberger:

This is to advise you that we have completed our investigation of the above referenced complaint filed by your client, Jonathan M. Zang (Complainant) against FMR Corporation, Fidelity Management & Research Company, FMR Company, Incorporated, Fidelity Select Portfolios and Fidelity Trend Fund on

September 15, 2005, under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act, Title VIII of the Sarbanes Oxley Act of 2002, 18 U.S.C. Section 1514A (hereinafter called SOX). In brief, you allege that you suffered several adverse actions which culminated in your termination from Fidelity Management & Research Company on July 15, 2005, in retaliation for emailing a "General Research Note" memorandum to peers, managers and executives on March 13, 2005, in which you alleged violations of U.S. Securities and Exchange Commission rules and regulations.

Following an investigation by a duly authorized investigator, the Secretary of Labor, acting through her agent, the Regional Administrator of the Occupational Safety and Health Administration (OSHA), Region I, finds that there is no reasonable cause to believe that Respondent violated SOX and issues the following findings:

Secretary's Findings

Respondents Fidelity Management and Research Company and FMR Co., Inc. are companies within the meaning of 18 USC 1514A in that they are required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)). Complainant was employed by Fidelity Management and Research Company, a wholly owned subsidiary of the parent corporation, FMR Corp. FMR Co., Inc. is a wholly owned subsidiary of Fidelity Management and

Research Company, and both FMR Co., Inc. and Fidelity Management and Research Company serve as investment advisers to the parent company's mutual funds. These funds, Fidelity Select Portfolios and Fidelity Trend Fund, are required to file reports under Section 15(d) of the Securities Exchange Act of 1934. Because these funds have no Board of Directors, Officers, or employees, FMR Co., Inc., and Fidelity Management and Research Company file these reports on behalf of the funds, thus making them covered companies under Section 806 of SOX. Because we are dismissing this complaint on other grounds, it is not necessary to determine whether FMR Corp., Fidelity Select Portfolios, and Fidelity Trend Fund are covered companies under SOX.

Complainant was employed by Respondents Fidelity Management and Research Company and FMR Co., Inc. as a research analyst and select fund manager in their U.S. Equities Department. Complainant is an employee covered under 18 U.S.C. Section 1514A.

On September 15, 2005, Complainant filed a complaint with the Secretary of Labor alleging that Respondents discriminated against him in violation of SOX. The complaint was timely filed.

Complainant began working for Respondents in September 1997, as a research analyst responsible for performing research on companies and stocks within an assigned industry. Respondents' policy is to rotate analysts among various sectors every two to three years. From October of 2001 through October 2004,

Complainant worked in the Healthcare Service Group. Analysts are required to regularly communicate information and provide investment insights to portfolio managers and other analysts who depend on such information to evaluate potential investments for the mutual funds they manage. In addition to his analyst duties, Complainant managed Select Portfolios mutual funds.

One of the tools used by Respondent to evaluate analysts is the Portfolio Manager Survey (PM Survey) in which portfolio managers rate analysts on quality of work, communication skills, impact, conviction, and creativity. A poor PM Survey rating will be reflected in an analysts' [sic] performance review. Complainant was very critical of the PM Survey and believed that it was subjective and not based on analysts' actual performance.

Throughout 2002 and early 2003, Complainant received poor performance reviews and in July 2003 was placed on a performance improvement plan. Although his performance improved while on the plan, he was warned that the improvement only brought him up to a minimum standard of acceptable work. Management required Complainant to get outside help with time management and provided him with a coach to assist him. His work over the summer and fall of 2004 showed some improvement, and this was acknowledged in his December 2004, performance review.

In October 2004, Complainant was transferred to the Energy group to serve as a research analyst there. In January of 2005, he began managing a select fund, the Select Natural Gas Fund. Complainant disagreed with Respondent's policy of rotating analysts and did not want to be transferred to the energy sector. After his transfer to the Energy Group, Complainant's performance deteriorated. The evidence shows that during the months leading up to his termination, Complainant produced significantly less work than similarly situated research analysts. He produced less than one half of the average number of notes produced by other analysts. Further, much of the work he did produce was actually prepared by others or was a modification of work prepared by outside brokerage firms. Many portfolio managers felt that Complainant's lack of output was impacting them, and they made their dissatisfaction with Complainant's performance known to Respondents.

During early winter 2005, Complainant's supervisor solicited volunteers for a task force to revise the research analysts' evaluation and compensation process and Complainant volunteered to participate.

On February 18, 2005, Respondent emailed the Fidelity Select Portfolio's Statement of Additional Information (SAI) to all portfolio managers and research analysts for review and comment. An SAI contains information about a mutual fund that must be made available to investors upon request, and supplements the fund's prospectus. The SAI circulated on February 18, 2005, was also filed with the SEC

for review and comment,. prior to being made available to shareholders.

On March 13, 2005, Complainant, using Respondents' electronic communications system, distributed an email entitled "We Should Each Take a Stand to Save FMR" to approximately one hundred colleagues, managers and executives. Complainant attached two documents to the email: a twelve page memorandum which contained Complainant's opinions about Respondent's deficiencies in areas such as leadership and management, with a focus on criticism of the company's analyst evaluation and compensation process; and a single page with the words "PM Survey" with a circle around them and a line drawn through them. Complainant's memorandum urged portfolio managers to abstain from using the PM Survey and encouraged them to hang the "no PM" symbol outside their offices to express their support for the abolishment of the survey, "in favor of evaluation tools that demonstrably benefit shareholders."

In the memorandum, Complainant quotes from the February 18, 2005, SAI and comments that while the attorneys may deem it technically correct, it " . . . portrayed inaccurately the relative importance of compensation drivers." Complainant was referring to criteria Respondents used in determining research analysts' compensation as select fund managers.

On another page in the memorandum Complainant inserted a boxed-in caption, or mock headline, stating:

"AG Riley to Fidelity: Return Fees for Veiled Index Funds – Boston Herald, xx/xx/05?"

Complainant alleges that the above references are the core of his protected activity. OSHA however, finds that neither of these references, nor anything else in the March memorandum, constitutes protected activity. Regarding Complainant's comments about the SAI, OSHA finds Complainant could not have had a reasonable belief that he was reporting violations of SEC rules or regulations or shareholder fraud. Complainant did not allege that Respondent either omitted or falsely listed factors used to derive analyst compensation. Given the timing of Complainant's memorandum; that the SAI had been circulated for comment and was still in the draft stage with the SEC; and that Respondent was already engaged in an open effort to involve employees in revising the evaluation/compensation process for analysts, Complainant's allegation lacks credibility.

Furthermore, his allegation that he was communicating that Respondent could be subject to prosecution for violations of securities laws related to charging excessive fees for "veiled index funds" is completely without merit. The only sentence in the twelve page memorandum dealing with this subject is devoid of any specific information and could not possibly be interpreted as "providing information" as protected by the Act.

Complainant alleges other instances of protected activity. He states that he engaged in protected

activity when he met with Mark Jensen, Respondent's Associate General Counsel, on March 18, 2005. Again, Complainant has failed to provide any evidence that he provided information to Jensen about fraud or violations of securities laws or fraud against shareholders. Complainant and Jensen did discuss Complainant's concerns about the SAI and the compensation system for analysts, and some of Complainant's suggestions were incorporated into the final version of the SAI.

OSHA also finds that an email Complainant sent to managers on April 11, 2005, was not protected activity under SOX. In the email, Complainant notes that he has attached a February 28, 2005, copy of the disclosure regarding Select Fund manager compensation and states that he believes it, "improves upon the plan in effect in 2004 by strengthening the connection between the Select fund performance and Select fund manager compensation. . . " The impression left by this email is that Complainant is satisfied that things are moving in the right direction and wishes to engage in further discussion of the issues he has raised – hardly an allegation of fraud or violations of law.

Complainant contends that following his March 13, 2005, memorandum, he suffered adverse actions including: not being allowed to attend a Board of Trustees meeting; receiving a written warning for sending the memo; being passed over for Respondent's Select Fund Performance Award; and finally, being terminated on July 15, 2005. Since OSHA has

determined that there was no protected activity, there is no need to examine each alleged adverse action.

Respondent has shown that many of the concerns Complainant raised in his memorandum were widely shared in the company, including among management. Respondent has provided credible evidence that its major concern about the March memorandum had to do with how much time Complainant had spent writing it, while failing to perform the duties of his job. Respondent has shown that the written warning Complainant received (later retracted) was not related to the content of the memo but rather to Respondent's perception that he misused company email and was disruptive in his method of communicating. It is clear that if Complainant's March 18, 2005, memorandum was a contributing factor at all, it was only because it focused attention on the fact that he was not doing his job.

The evidence shows that Respondent was in the process of management restructuring in April and May 2005, and it was during that restructuring that the company took a closer look at the performance of its analysts and portfolio managers. According to Respondents, when Complainant was terminated, two portfolio managers were discharged and one analyst was placed on a performance improvement plan.

Because Complainant has not shown that he engaged in protected activity, he has not established a prima

facie claim of retaliation. Furthermore, a preponderance of the evidence supports Respondent's contention that Complainant was terminated for poor performance.

Order

The complaint is dismissed.

Respondent and Complainant have 30 days from receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge (ALJ). If no objections are filed, these Findings will become final and not subject to court review. Objections must be filed in writing with:

Chief Administrative Law Judge
U.S. Department of Labor
Suite 400N, Techworld Building
800 K Street, NW
Washington, D.C. 20001-8002
(202) 693-7542, Facsimile (202) 693-7365

With copies to:

Respondent

Marthe B. Kent
Regional Administrator
Occupational Safety and Health Administration
J.F.K. Federal Building, Room E-340
Boston, MA 02203

In addition, please be advised that the U.S. Department of Labor generally does not represent any party in the hearing; rather, each party presents his or her

own case. The hearing is an adversarial proceeding before an Administrative Law Judge (ALJ) in which the parties are allowed an opportunity to present their evidence de novo for the record. The ALJ who conducts the hearing will issue a decision based on the evidence, arguments, and testimony presented by the parties. Review of the ALJ's decision may be sought from the Administrative Review Board, to which the Secretary of Labor has delegated responsibility for issuing final agency decision under SOX. A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of the complaint. The rules and procedures for the handling of SOX cases can be found in Title 29, Code of Federal Regulations Part 1980, a copy of which was sent to you earlier, and may be found at www.osha.gov.

Sincerely,

/s/ Marthe B. Kent
Marthe B. Kent
Regional Administrator

cc: Mr. Wilfred J. Benoit Jr., Esq.
Chief Administrative Law Judge, USDOL
U.S. Securities and Exchange Commission

AFFIDAVIT OF ETHAN DAVIS, EXHIBIT 6

Filed in *Zang v. Fidelity Management & Research Company, et al.*, United States District Court, District of Massachusetts (Boston)

Case No. 1:08-cv-10758-DPW

June 6, 2008

U.S. Department of Labor
Office of Administrative Law Judges
O'Neill Federal Building – Room 411
10 Causeway Street
Boston, MA 02222

(617) 223-9355 [SEAL]
(617) 223-4254 (FAX)

Issue Date: 27 March 2008

CASE NO.: 2007-SOX-00027

In the Matter Of:

JONATHAN ZANG
Complainant

v.

FIDELITY MANAGEMENT & RESEARCH COMPANY, FMR CO., INC., FMR CORP, FIDELITY SELECT PORTFOLIOS, and FIDELITY TREND FUND
Respondents

Appearances:

R. Scott Oswald, Nicholas W. Woodfield and Jason Zuckerman, The Employment Law Group, PC, Washington, D.C. for the Complainant

Wilfred J. Benoit, Jr. and Ethan Z. Davis, Goodwin Proctor LLP, Boston, MA for Respondents

DECISION AND ORDER GRANTING SUMMARY DECISION DISMISSING COMPLAINT

Jonathan M. Zang ("Complainant") filed a complaint of discrimination against Fidelity Management & Research Company, FMR Co., FMR Corp.,[1] Fidelity Select Portfolios, and Fidelity Trend Fund (Respondents) under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of The Sarbanes-Oxley Act of 2002, 18 U.S.C.A. § 1514A (West 2004) ("Sarbanes-Oxley" or the "Act") and the procedural regulations found at 29 C.F.R. Part 1980 (2004), alleging that he was terminated in violation of the Act.[2] On April 3, 2007, the Respondents filed a motion for summary decision. (Mot. SD). On May

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[1] The Named Respondent FMR Corp. was merged into a limited liability company after the complaint was filed in the present action. FMR LLC is the surviving entity.

[2] For clarity of discussion herein I refer to Respondents Fidelity Management & Research Company, FMR Co., FMR Corp. (FMR LLC), as Respondents Fidelity and to Respondents Fidelity Select Portfolios, and Fidelity Trend Fund as Respondent Fidelity Funds.

8, 2007, the Complainant opposed the motion for summary decision (Opp. to SD) and filed a motion pursuant to Rule 56(f) of the Federal Rules of Civil Procedure seeking to stay consideration of Respondents Fidelity's motion for summary decision to permit discovery.[3] On October 4, 2007, I issued an Order Granting Complainant's Rule 56(f) Motion to Delay Consideration of the Motion for Summary Decision Pending Discovery and permitted discovery on the issue of whether Respondent Fidelity is a covered employer under Section 806 of the Act.

The parties have now completed discovery on the issue of coverage. On February 3, 2008, the Complainant filed his Supplemental Opposition to Respondents' Motion for Summary Decision. (Zang Supp. Opp.) Respondents filed a Supplemental Reply Memorandum in Further Support of Respondent's Motion for Summary Decision Dismissing the Complaint on February 15, 2008.[4] (Resp. Supp. Reply)

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[3] On June 8, 2007, Respondents submitted a Reply Memorandum in Further Support of the Motion for Summary Decision and an Opposition to the Complainant's Rule 56(f) Motion. The Complainant filed a Surreply Opposing Summary Decision on June 21, 2007. Respondents opposed the Surreply on July 5, 2007.

[4] Respondent filed a Motion to File Under Seal the minutes of three Board meetings pursuant to the parties' confidentiality agreement which was approved by the undersigned on January 8, 2008. Complainant has filed a consent to the motion and the motion is granted.

I. Uncontested Facts[5]

1. The Complainant was employed as a research analyst at Fidelity Management & Research Company beginning in 1997 and was later employed by FMR Co. Inc. until his termination in 2005. Complaint. ¶1; Mot. SD Ex. 3 (Lombardi Decl);[6] Opp. to SD. at Ex. 1 at 2.[7] In the Fall of 2001, Zang was assigned to the Health Care Services group, where he served as research analyst and managed the Select Medical Delivery Portfolio. In October 2004 he was transferred to the Energy group, where he served as

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[5] Zang submitted a Statement of Material Facts in Dispute (Statement) with his Supplemental Opposition to Summary Decision along with fifty-two exhibits. The Statement includes what Zang contends are undisputed facts and also disputed facts. Respondents indicate that for purposes of this motion, they accept all of the admissible evidence offered by Zang. (Respondents have moved separately to strike the disclosure of expert Mercer E. Bullard). In reviewing Zang's Statement and the evidence submitted, many of the alleged "disputed" facts are not actually factual disputes, what is disputed is the legal conclusion one ought to draw from the facts. To the extent that additional facts, not outlined above, may be relevant or necessary to the discussion herein, those additional facts will be referenced under analysis of the specific issues.

[6] Dana Lombardi is Vice President and Director, Human Resources for FMR Co. Mot. SD Ex 3; Zang Supp. Opp. (Statement (Proper Names)).

[7] The factual references include reference to submissions by the parties in their initial complaint, motion for summary decisions, opposition and reply.

research analyst and in January 2005 he also began managing the Select Natural Gas Portfolio.[b] *Id.*

2. Respondent FMR Co. is a wholly owned subsidiary of Respondent Fidelity Management & Research Company, which is a wholly-owned subsidiary of Respondent FMR Corp. Mot. SD Ex. 4 (Wyant Decl); Opp. to SD at 2-3. FMR Co., Fidelity Management & Research Company, and FMR Corp. (Respondents Fidelity) are privately held companies. *Id.* at ¶2. None of these three entities have securities registered pursuant to Section 12 of the Securities and Exchange Act of 1934, nor are any of the three entities required to file reports pursuant to Section 12(d) of the Securities and Exchange Act of 1934. Mot. SD Ex. 4 (Wyant Decl).

3. Fidelity Select Portfolio and Fidelity Trend Funds are two of the mutual funds in the Fidelity Mutual Fund family of funds. Fidelity Select Portfolio is made up of 42 separate funds and the Fidelity Trend Fund has one fund, the Fidelity Trend Fund. *Id.* at ¶¶ 8, 9. Fidelity Select Portfolio and Fidelity Trend Funds (Respondents Fidelity Funds) are required to file reports under Section 15(d) of the Securities and Exchange Act of 1934. *Id.* at ¶¶ 12, 13; Compl. ¶¶ 7, 8;

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[b] The Select Medical Delivery Portfolio and Select Natural Gas Portfolio are two of the 42 separate portfolios that make up the Fidelity Select Portfolios Fund. Mot. SD (Wyant Decl ¶ 8).

4. The Fidelity Funds are owned by the shareholders of the funds. Mot. SD. Ex. 4 (Wyant Decl.) at ¶4.

5. Respondent Fidelity Management & Research Company has a management contract to act as investment advisor to Fidelity Trend Fund and each of the funds in the Fidelity Select Portfolio. *Id.* at ¶7. Under the terms of the contract, Fidelity Management & Research Company is responsible for directing the investments of each fund consistent with the investment objectives, policies and limits of each fund. *Id.* at ¶10.

6. Fidelity Management & Research Company is subject to the supervision of the Fidelity Mutual Funds' Board of Trustees in carrying out its contractual obligations. *Id.* The Board of Trustees meets throughout the year in overseeing the Fidelity Mutual Funds. *Id.* at ¶ 4; Resp. Supp. Reply, Ex 3 at 23:17-22, 24:1-6.

7. The Fidelity Funds Board of Trustees meets throughout the year to review the performance of each of the Fidelity Funds. The Board of Trustees have established a committee structure to facilitate their oversight responsibility. *Id.* at ¶ 6; Resp. Supp. Reply Ex 2 at 98:21-22, 99:1-22; Ex 3 at 26:10-22.

8. In performing this oversight function the Fund Board meets annually with the portfolio manager to review the performance of each fund. Resp. Supp. Reply, Ex 1 at 148:6-12; Ex 3 at 26:17-22. If a fund is underperforming, the Fund Board discusses

performance improvements with Fidelity. Resp. Supp. Reply, Ex 1 at 149:4-13; Ex 3 at 23:17-22, 24:1-6. The Fund Board is not involved in day-to-day operations at Respondent Fidelity, does not participate in personnel decisions regarding individuals assigned by Fidelity to work on specific Funds and has not sought to replace portfolio managers. Resp. Supp. Reply, Ex 1 at 164:1-5; Ex 3 at 41:18-20, 43:11-14, 62:2-15, 63:5-10, 89:7-13, 104:15-22, 110:2-14.

9. Fidelity Management & Research Company has a sub-advisory agreement with FMR Co., under which FMR Co. is responsible day-to-day for selecting investments for many Fidelity mutual funds including the Respondents' Fidelity Select Portfolio and Fidelity Trend Funds. Mot. SD Ex 4 (Wyant Decl. at ¶ 11).

10. In addition to investment advice, pursuant to the management contracts Fidelity Management and Research or its affiliates provide management and administrative services required to operate each mutual fund, including maintaining the fund's records and registration of each Fund's shares under federal securities law as well as furnishing office space, equipment and personnel for servicing the investments of the Portfolio. *Id.* at ¶¶11, 13; Resp. Supp. Reply Ex 4 and Ex 5; Zang Supp Opp. Ex 9. Fidelity Management & Research Company is also responsible for registering the Funds' shares and preparing drafts of reports required by the SEC. *Id*; Compl. at 2.

11. The Fidelity Fund's Board of Trustees annually assesses and reviews whether or not it will renew the mutual funds investment advisory contracts with Respondent Fidelity on an annual basis. Mot. SD Ex 4 (Wyant Decl) at ¶4.

12. Respondent Fidelity Funds (Fidelity Select Portfolio and Fidelity Trend Funds) has officers and a board, but does not have any employees. *Id.*

13. In 2005, the Fidelity Fund Board of Trustees included four interested trustees. (Edward Johnson, Robert Reynolds, Stephen Jonas and Abigail Johnson) Zang Supp Opp., Ex 2 at 48:10-49:9; EX 1 at 71:15-72:5; Resp. Reply in Support of Mot Sum Dec. at 10; Mot. SD Ex 4 (Wyant Decl) at ¶5. Trustees are deemed interested under the Investment Company Act of 1940, 15 U.S.C. § 80(a)-2(a)(19) based on, among other things, affiliation with a Fidelity Mutual Fund or various entities under common control with an investment adviser. Mot SD Ex 4 (Wyant Decl) at ¶5; Resp. Supp Reply Ex 9 at 28:5-7. Independent Trustees are trustees who are not interested as that term is defined in the Investment Company Act of 1940 in other words trustees that do not have a financial interest in Respondent Fidelity. Resp. Supp Reply Ex 9 at 28:16-17. The majority of Trustees were independent and the independent trustees were a supermajority of the Fidelity Funds Board. Zang Supp. Opp, Ex 50, Resp. to Interrogatory No. 20.

14. Fidelity research analysts perform research on assigned companies and stocks within a given

industry. Mot. SD Ex. 1 (Lombardi Decl.) at ¶3; Resp. Supp Reply Ex 3 at 51:1-6, 97:16-22. Fidelity portfolio managers ("PMs") manage large diversified mutual funds that invest across a spectrum of industries. Mot. SD Ex. 1 (Lombardi Decl.) at ¶3.

15. On or about February 18, 2005, Zang and other research analysts who served as Fidelity Select Portfolios managers received a draft Statement of Additional Information ("SAI") for review and comment. Mot. SD at 7 (Jensen Decl at ¶2); Compl ¶10; Zang Supp. Opp. Ex 33.

16. On March 13, 2005, the Complainant sent an e-mail memorandum titled "We Should Each Take A Stand" to over 100 other Fidelity employees. Mot. SD. at Ex. 2; Opp to SD at 31. In this memorandum the Complainant discusses and criticizes several Fidelity policies as being inconsistent with company goals and he makes suggestions he believes will improve the company. The Complainant questions Fidelity's current structure regarding the relationship between research analysts and PM's, including a Fidelity career path that the Complainant believed undervalued analysts and increased the number of PMs with little regard for the effect on overall mutual fund returns. The Complainant was also highly critical of the use of PM surveys in evaluating and compensating analysts and he questioned whether the use of such a tool in evaluating analysts advanced the goal of shareholders to maximize returns. Mot. SD at Ex. 2. The Complainant suggested various changes to Fidelity's philosophy and business

practices that he asserted would improve performance of the funds.

The Complainant also quoted a portion of a draft SAI for the Fidelity Select Portfolios fund filed with the Securities and Exchange Commission ("SEC") and which had been distributed to him and to other research analysts who served as Fidelity Select Portfolios fund managers for comment. Zang's memo stated that the SAI's statements regarding fund managers compensation "portrayed inaccurately the relative importance of compensation drivers." *Id.* at 5.

17. On March 15, 2005, Katherine Collins, the former head of U.S. Equities for Respondent Fidelity, informed the Complainant that his previously required attendance at the March 17 Board of Trustees meeting for Select Medical Delivery Fund was not necessary. Compl. at ¶13; Compl. Response to Respondents Response to Complainant's Memo of Fact and Law at Tab 3; Zang Supp. Opp. Ex 36.

18. On March 18, 2005, Ms. Collins sent a voicemail message to Portfolio Managers and Research Analysts which criticized the use of company e-mail to complain about the company as inappropriate. Compl. at 15; *Id.*

19. On the same day, Ms. Collins gave the Complainant a written warning, which was copied to John McDowell, Senior Vice President of Respondent Fidelity Management and Research Company, stating that the manner in which he complained of Fidelity policies violated the Company policy prohibiting

solicitation. Resp. Opp. to Default at Tab C1G; Zang Supp. Opp. Ex 17; Resp. Supp. Reply Ex 1 (Lombardi Dep.) at 124:15-20.

20. On March 18, 2005, the Complainant met with Mark Jensen, Associate General Counsel for FMR Corp., regarding his comments on the draft SAI. As a result of this meeting, some clarifying language changes were made to the SAI to address concerns raised by Zang. *Id.* at Ex. 5 (Jensen Decl) at ¶¶4, 5, 8.; Compl. at 4; Zang Supp. Opp. Ex 47; Resp. to Interrogatory No. 19).

21. On June 27, 2005, the Complainant was notified by Boyce Greer, FMR Co. Senior Vice President of Equity Research and Asset Allocation and Dana Lombardi, FMR Co. Human Resources Vice President, that his employment was terminated effective July 15, 2005. *Id.* at Ex. 5 (Jensen Decl) at ¶12, Compl. at ¶25.

22. The Complainant was terminated on July 15, 2005.

II. Standard of Review – Summary Decision

The standard for granting summary judgment or decision is set forth at 20 C.F.R. § 18.40(d) which is derived from Federal Rules of Civil Procedure (FRCP) 56.[9] Section 18.40(d) permits an Administrative Law

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[9] Rule 56(c) provides that summary decision shall be rendered "if the pleadings, depositions, answers to interrogatories,

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Judge to enter summary decision, "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show there is no genuine issue as to any material fact and that a party is entitled to summary decision." 20 C.F.R. § 18.40(d) (1994). A material fact is one whose existence affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And, a genuine issue exists when the non-movant produces sufficient evidence of a material fact so that a fact finder is required to resolve the parties' differing versions at trial. *Id.* at 249.

In deciding a Rule 56 motion for summary decision, the Court must consider all the material submitted by both parties, drawing all reasonable inferences in a manner most favorable to the non-movant. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-159 (1970). In other words, the Court must look at the record as a whole and determine whether a fact -finder could rule in the non-movant's favor. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The movant has the burden of production to prove that the non-movant cannot make a showing sufficient to establish an essential element of the case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has met its burden

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admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Proc. 56(c).

of production, the non-movant must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. *Id.* at 324. If the non-movant fails to sufficiently show an essential element of his case, there can be "'no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-movant's case necessarily renders all other facts immaterial." *Id.* at 322-323.

III. Coverage Under Section 806 of Sarbanes Oxley

A. Statutory Provision

Section 806 of Sarbanes-Oxley provides that no publicly traded company,[10] "or any officer, employee, contractor, subcontractor or agent of such company may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee" for (1) providing information the employee reasonably believes constitutes a violation of section 1341 (mail fraud), 1343 (wire fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders or for (2) participating in a

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[10] Publicly traded companies are companies with a "class of securities registered under Section 12 of the Securities Exchange Act of 1934," or a company that "is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 . . " 18 U.S.C.A. § 1514A.

proceeding alleging such violations. 18 U.S.C.A. § 1514A(a). The question presented in this matter is whether Respondent Fidelity is a covered employer under Section 806 of the Act, thereby making Zang a covered employee.

B. Parties' Contentions

The parties acknowledge that Respondents Fidelity are not publicly held companies but rather are privately owned companies. However, Complainant contends that Respondent Fidelity is a covered employer as either a contractor or agent of Respondent Fidelity Funds, the publicly traded companies, or that Respondent Fidelity and Respondent Fidelity Funds are an integrated enterprise. Zang contends that the "plain meaning" of the statutory phrase "any officer, employee, contractor, subcontractor or agent of such company" protects "all persons potentially in a position to report shareholder fraud or other violations of SEC rules – including the employees of contractors and agents of public companies." Zang Supp. Opp. at 30. The Complainant argues that construing Section 806 to exempt privately owned investment advisers, such as Respondent Fidelity, from coverage creates a significant loophole that Congress intended to close in promulgating the Sarbanes-Oxley Act. Zang Supp. Opp. at 32.

Respondents assert that Respondents Fidelity are privately held entities and are not covered under SOX as contractors or agents of Respondent Fidelity

Funds, nor are Respondents Fidelity and Respondent Fidelity Funds an integrated enterprise. Respondents argue that under the Investment Company Act of 1940 and the Investment Advisers Act of 1940, which govern the mutual fund industry investment advisers such as Fidelity, and investment companies such as Fidelity Funds are separate and distinct entities and that Congress did not intend to amend the statutory and regulatory scheme covering the mutual fund industry. Resp Supp Reply at 5-6. Respondents assert that the statutory phrase at issue simply lists the "various actors who are prohibited from discriminating against employees of publicly-traded companies." Resp. Supp. Reply at 14 (citations omitted). Resolution of the question of coverage depends upon the meaning of the statutory language of Section 806 which provides no publicly traded company, "or any officer, employee, contractor, subcontractor or agent of such company may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee." 18 U.S.C.A. § 1514A(a).

Complainant's construction of Section 806 makes the provision a general whistleblower provision applying to public companies but also to any privately owned company having a contract or having any type of agency relationship with a publicly traded company. This is an exceptionally broad reading of Section 806.[11] Had Congress intended such an expansive

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[11] In *Brady v. Calyon Sec. (USA)*, 406 F. Supp. 2d 307, 318 (S.D.N.Y. 2005) the District Court stated that Section 806's

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application of Sarbanes-Oxley's whistleblower provision it would have plainly said as much. On the other hand, Respondents reading of the provision as simply a list of other actors prohibited from discriminating against employees of publicly traded companies appears to be inconsistent with the Department of Labor's Administrative Review Board's ("ARB") decision in *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, ARB 04-149, ALJ No. 2004-SOX-11 (ARB May 31, 2006). In *Klopfenstein*, the ARB held that a non public subsidiary of a publicly held company may be covered by the whistleblower provision of Sarbanes-Oxley if the subsidiary is an agent of the public company with regard to employment matters.

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reference to "any officer, employee, contractor, subcontractor, or agent of such company" simply lists the various potential actors who are prohibited from engaging in discrimination on behalf of a covered employer" citing *Minkina v. Affiliated Physicians Group*, No. 2006-SOX-19, at 6 (ALJ Feb. 22, 2005), appeal dismissed (ARB July 29, 2005). The District Court continued stating "[t]he Act makes plain that neither publicly traded companies, nor anyone acting on their behalf, may retaliate against qualifying whistleblower employees. Nothing in the Act suggests that it is intended to provide general whistleblower protection to the employees of any employer whose business involves acting in the interests of public companies." The Court went on to reject the notion that the Sarbanes-Oxley Act's "use of the word 'agent,' adopted a general whistleblower protection provision governing the employment relationships of any privately-held employer. . . . that has ever had occasion, in the normal course of its business, to act as an agent of a publicly traded company . . . " 406 F. Supp 2d at 318. As the plaintiff was an employee of a non publicly traded company, the District Court dismissed the Sarbanes-Oxley claim.

C. Interpretation of Section 806

As the Complainant and Respondents both contend that the "plain meaning" of the statutory language and the legislative history of Section 806 supports their conflicting constructions of the statute, it is appropriate to consider other language in the provision, other provisions of the same statute, the legislative history and any decisions construing and applying the statutory provision in an attempt to discern the intent of Congress. *See* Zang Supp. Opp at 29-37; Resp. Supp. Reply at 6-12.

Section 806 of the Act is titled "Whistleblower Protection For Employees of Publicly Traded Companies." The title suggests that Section 806 applies only to publicly traded companies. While the title of a provision is not controlling as to its meaning, it provides some insight into Congressional intent in terms of the employees to whom Congress intended to provide whistleblower protection.

A basic rule of statutory construction is that words and phrases should not be parsed in isolation. **National Bank of Or. v. Independent Ins. Agents of Am., Inc**. 508 U.S. 439, 453, 113 S.Ct. 2171, 2182 (1993). The courts and the ARB have held that in interpreting a statute "a court must not be guided by a single sentence or member of a sentence but instead must look to the law as a whole and to its object and policy." **National Bank of Or**. 113 S.Ct. at 2182. *See also*, *OFCCP v. Keebler*, ARB No. 97-127, ALJ No. 1987-OFC-20 (ARB Dec. 21, 1999).

In applying this rule, it may be helpful to examine other provisions of the same statute in an effort to discern the reach of the Section 806. Other provisions of Sarbanes-Oxley explicitly apply to individuals who may not be employees of publicly traded companies, suggesting that Congress understood the parameters of Section 806. For example, in Section 307 Congress enacted an attorney professional responsibility provision which required the Securities and Exchange Commission to promulgate rules "in the public interest and for the protection of investors" establishing minimum standards of conduct for attorneys appearing and practicing before the Commission *in any way* in the representation of issuers. (emphasis supplied). This provision requires attorneys to report evidence of material breach of securities law or breach of fiduciary duty by a company or its agent. Section 307 is broadly worded and covers any and all "attorneys appearing and practicing before the Commission in any way in the representation of issuers." The provision applies any time an attorney appears before the SEC on an investment company's behalf and thus this provision is intended to have wider application as a means of protecting investors.

Similarly, Section 406 requires the SEC to implement regulations requiring issuers to establish a code of ethics for senior financial officers, including the principal financial officer, the comptroller or principal accounting officer or persons performing similar functions. Thus, Congress created a functional test under Section 406 in establishing a code of

ethics for senior financial officers of issuers in an effort to protect investors. In contrast, Section 806 does not utilize a functional test. This suggests that Congress intended the two provisions to operate independently.

In addition, when enacting Sarbanes-Oxley, Congress was certainly aware of investment advisers and investment companies, and the way in which the majority of the mutual fund industry operates, yet it did not specifically refer to these entities in Section 806, but it did make specific reference to investment companies and investment advisers in other provisions of Sarbanes-Oxley. For instance, Section 405 exempts investment companies registered under Section 8 of the Investment Company Act of 1940 from specific provisions of Sarbanes-Oxley; Section 201(a) includes investment advisers in amendments to the 1934 Act; and Section 604(b) titled Investment Advisers amends the Investment Advisers Act.[12]

The legislative history may also provide insight to Congress' intent in promulgating a specific statute. The Congressional Record states that the purpose of

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[12] Investors are protected against fraud and conflicts of interest by other statutes and regulations. For example, the mutual fund industry is specifically regulated by the Investment Company Act and the Investment Advisers Act of 1940 which recognize that investment companies and investment advisers are separate. 15 U.S.C. § 80b-1, *et seq*. Additionally, the SEC has promulgated rules and regulations governing the mutual fund industry under the Investment Advisers Act.

Section 806 of the Act is to "provide whistleblower protection to employees of publicly traded companies . . . when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, their supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping actions which they reasonably believe to be fraudulent," and to "protect those who report fraudulent activity that can damage innocent investors in publicly traded companies." 148 Cong. Rec. S7420, 2002 WL 1731002 (daily ed. July 26, 2002). Senator Sarbanes, a key sponsor of the Act, stated he wanted to "make very clear that [SOX] applies exclusively to public companies – that is, to companies registered with the Securities and Exchange Commission. It is not applicable to the pr[ivat]e companies, who make up the vast majority of companies across the country." 148 Cong. Rec. S7350, 7351 (July 25, 2002).

However, Complainant argues that the legislative history shows Congress was concerned with "the opportunity for a contractor of a publicly traded company to retaliate against its own employee who blows the whistle on a publicly traded company's violation of an SEC rule." (Zang Supp. Opp. at 30-31). Zang relies upon comments in the legislative history discussing "The aftermath of Enron's collapse and the cover up" which noted attempts by various whistleblowers in the Enron situation including a partner in Arthur Andersen, the accounting firm, noting the Andersen partner "was removed from the Enron

account when he expressed reservations about the firm's financial practices in 2000." S. Rep. No. 107-146, S. Rep. No. 146, 107th Cong., 2nd Sess. 2002 (May 6, 2002) at 5. While Congress discussed the situation of the Arthur Anderson employee, Sarbanes-Oxley addressed Congress' concern over the role accountants played in the Enron collapse by including several provisions specifically addressing accountants and accounting firms including mandating the creation of standards of conduct, sharpening requirements for accounting firms in performing audits, and establishing significant penalties for non compliance.[13] Therefore, Zang's assertion that the investing

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[13] Section 101 creates a Public Company Accounting Oversight Board (Board) to oversee the audit of public companies in order to protect investors and further the public interest in the preparation of informative, accurate, and independent audit reports for companies whose securities are sold to and held by or for public investors. The Board is required to adopt auditing, quality control, ethics, independence, and other rules or standards addressing the preparation of audits for issuers under Section 103. Section 104 provides for inspections of registered public accounting firms. Section 105 directs the Board to set up procedures for the investigation and discipline of registered public accounting firms and associated persons of such firms. *See also* Section 2(9) which defines "person associated with a public accounting firm" broadly to include "any individual proprietor, partner, shareholder, principal, accountant or other professional employee of a public accounting firm, or any other independent contractor or entity that, in connection with the preparation or issuance of any audit report shares in the profits of" or "is compensated from the firm" or participates as agent or otherwise on behalf of such accounting firm in any activity of that firm." Section 201 prohibits auditors from providing other named services to any issuer contemporaneously

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public will be left unprotected unless Section 806 applies to privately-held investment advisers is overstated.

Initially, several administrative law judges and district courts construed Section 806 as applying only to publicly-traded companies. *Reno v. Westfield Corp., Inc.* 2006-SOX-00030 (ALJ Feb. 23, 2006) at 3 ("merely being a contractor or agent of a publicly traded company is not enough to impose liability"); *Goodman v. Decisive Analystic Corp.*, 2006-SOX-00011 (ALJ Jan. 10, 2006) 9-10(dismissed complaint by employee of non public company providing consulting services to public companies, stating employees of private contractors and subcontractors of publicly traded companies not covered by SOX whistleblower provision.); *Minkina v. Affiliated Physician's Group*, 2005-SOX-00019 (ALJ Feb 22, 2005) at 6 (rejecting employee of non public company's assertion of coverage as based upon non-public company's contracts with public companies, holding language referring to "any officer, employee, contractor, subcontractor or agent of such company" simply lists the various potential actors who are prohibited from engaging in discrimination on behalf of a covered employer."); *Felszar v. Am. Medical Ass'n.*, 2007-SOX-00030 at 3 (ALJ June

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with the audit, in order to remove any conflicting financial incentive accounting firms may have in providing both audit services and non audit services to the same company. Under Section 107, the Securities and Exchange Commission possesses oversight and enforcement authority over the Board.

13, 2007) (non-public organization's contracts with public companies insufficient to establish coverage under Section 806); *Brady v. Calyon Sec (USA)*, 406 F. Supp. 2d 307, 318 (S.D.N.Y. 2005) (district court concluded that Section 806's reference to "any officer, employee, contractor, subcontractor, or agent of such company" simply lists the actors who are prohibited from discriminating on behalf of a covered employer.)

However, in *Klopfenstein*, the ARB rejected an interpretation of Section 806 that would "require a complainant to name a corporate respondent that is itself 'registered under § 12 or . . . required to file reports under § 15(d),' so long as the complainant names at least one respondent who is covered under the Act as an 'officer, employee, contractor, subcontractor or agent' of such a company." *Klopfenstein*, ARB No. 04-149 at 13. The ARB went on to hold that a non public subsidiary of a publicly-traded parent company may be subject to the whistleblower provision of the Act if it acted as an agent of the public parent company in employment matters. *Id.* at 13-14.[14] I am bound by the precedent established by the ARB's *Klopfenstein* decision.

Respondent Fidelity argues that *Klopfenstein* is inapposite as it involved a parent-subsidiary relationship and the employees of the public parent were

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[14] The ARB remanded the matter to the administrative law judge to assess whether the privately-held subsidiary was an agent of the public parent company.

involved in the decision to terminate the complainant. Although *Klopfenstein* involved companies with a parent/subsidiary relationship, the ARB construed and applied the term "agent" included in the coverage provision of Section 806 of the Sarbanes-Oxley Act. The initial question then is whether the rationale in *Klopfenstein* is appropriately applied in circumstances where the non public and the publicly held entity are not subsidiary/parent corporations, but are separate entities whose businesses may have an agency relationship.

The general corporate law principle holds that parent companies are not *ipso facto* liable for the actions of their subsidiaries. *United States v. Bestfoods*, 524 U.S. 51, 61, 63 (1998); *Rao*, 2007 WL 1424220 at 8-9. Nonetheless, as *Klopfenstein* directs, a parent corporation may be liable for the actions of its subsidiary if the subsidiary is acting as the agent of the parent with regard to the allegedly retaliatory employment action. Similarly, although investment companies and investment advisers are separate entities, I discern no policy rational for limiting the ARB's holding in *Klopfenstein* to situations involving a subsidiary and parent. Therefore, I must evaluate the parties' assertions and evidence to determine whether Zang has shown either that Respondent Fidelity is an agent of Respondent Funds and was acting on behalf of Respondent Funds when it terminated his employment, or has demonstrated that there are material facts in dispute on this issue.

D. Is Respondent Fidelity an Agent of Respondent Fidelity Funds?

As noted, the ARB has construed Section 806, holding that a non public subsidiary of a publicly held company *may* be covered under the whistleblower provisions of Sarbanes-Oxley if the subsidiary is an agent of the public parent company. *Klopfenstein* ARB 04-149 at 14-15.[15] In determining whether a particular subsidiary is an agent of a public parent for purposes of the Sarbanes-Oxley Act's anti-discrimination provision, the ARB instructs that principles of general common law of agency are applied. *Klopfenstein*, ARB 04-149, slip op. at 14. The ARB stated "[a]lthough [agency] is a legal concept, 'agency depends upon the existence of required factual elements: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties

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[15] In *Klopfenstein*, the ARB did not address the district court's decision in *Brady v. Calyon Securities (USA), et al.* 406 F. Supp. 2d 307, 318-319 (S.D.N.Y. 2005). In *Brady* the Court dismissed a SOX claim by a research analyst who worked for a privately owned subsidiary of a publicly-held company. The District Court rejected the complainant's claim that as a research analyst at an investment bank, his employer acted as "agents and/or underwriters of numerous public companies." *Id.* at 318. The Court stated that [t]he mere fact that defendants may have acted as an agent for certain public companies in certain limited financial contexts related to their investment banking relationship does not bring the agency under the employment protection provisions of Sarbanes-Oxley. . . ." *Id.* at 318-319.

that the principal is to be in control.'" *Klopfenstein*, ARB 04-149 at 14, citing Rest. 2d Agen. § 1(1), comment b.[16] Factors relevant in assessing whether an agency relationship exists include whether there are overlapping officers between the two companies and whether the principal was involved in decisions relating to the complainant's employment. *Id.* at 15; *see also, Rao v. Daimler Chrysler Corp.* 2007 WL 1424220 (E.D. Mich) (May 14, 2007) slip op. at 5

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[16] Restatement (Third) completely replaced Restatement (Second) of Agency which was first published in 1958. The definition of agency referenced above by the ARB also appears in Restatement (Third) (§ 1.01 Agency Defined) along with comments providing:

> Comments: (c) Elements of agency: As defined by the common law, the concept of agency posits a consensual relationship in which one person, to one degree or another or respect or another, acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person. The person represented has the right to control the actions of the agent. Agency thus entails inward-looking consequences, operative as between the agent and the principal, as well as outward-looking consequences, operative as among the agent, the principal, and third-parties with whom the agent interacts. Only interactions that are within the scope of an agency relationship affect the principal's legal position.

Not all relationships in which one person provides services to another satisfy the definition of agency. It has been said that a relationship of agency always "contemplates three parties the principal, the agent, and the third party with whom the agent is to deal." 1 Floyd R. Mechem, A Treatise on the Law of Agency § 27 (2d ed. 1914).

(granting summary decision dismissing SOX complaint as plaintiff failed to allege anyone at parent corporation knew of or participated in decisions regarding his employment). However, the ARB has also recognized that "to be covered under the Act, of course, an individual must not only be an agent of a public company, but also must "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment." *Klopfenstein*, ARB 04-149 at 16, citing 18 U.S.C.A. § 15.14A(a).

First, Zang argues that the management contracts between Respondent Fidelity and Respondent Fidelity Funds, as well as the fiduciary duty Respondent Fidelity as an investment adviser, owes Respondent Funds the investment company, under securities laws, establishes agency. However, with regard to the management contracts, the contracts specifically provide that "[t]he Adviser (Respondent Fidelity) shall, in acting hereunder, be an independent contractor. The Adviser shall not be an agent of the Portfolio." Resp. Supp. Reply Ex 4 ¶1(c)(2); Ex 5 ¶1(c)(2). This provision demonstrates that Respondent Funds did not intend Respondent Fidelity to operate as its agent, but rather as an independent contractor. Pursuant to the management contracts, Fidelity provides investment advisory services to the Funds including, acting as investment adviser to the funds, directing the investments of the funds, furnishing all necessary personnel for servicing the investments of the funds. The contracts also provide

that the "investment policies and all other actions of [each fund] are and shall at all times be subject to the control and direction of the Fund[s]' Board of Trustees." Resp Supp. Reply Ex 4 at ¶ 1(a). Under terms of the management contracts, it is Respondent Fidelity that determines how many employees are needed to service the investments of the funds, which individuals are hired, the compensation paid and the work assignments. Nothing in the management contracts reflects that Respondent Fidelity Funds plays a role in decisions related to who is hired, the compensation rate or any other matter related to employment of Respondent Fidelity employees. In providing these investment advisory and management services, Respondent Fidelity functions as an independent contractor as Fidelity is in control of how it provides the services contracted for, subject only to compliance with investment policies the Respondent Funds Board establishes for each fund.[17]

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[17] In support of his agency assertion, Zang points to the provision of the management contracts, which state that Respondent Fidelity is to provide certain management services which require Fidelity "on behalf" of the Respondent Funds and "subject to the supervision of the Respondent Funds Board of Trustees' to "supervis[e] relations with, and monitor the performance of custodians, depositories, transfer and pricing agents, accountants, attorneys, underwriters, brokers and dealers, insurers and other persons in any capacity deemed to be necessary or desirable . . " Resp. Supp. Reply at Ex 4 ¶1(b). This function is also performed as an independent contractor under the express terms of the contract for services between Fidelity and the Fidelity funds. Even if Respondent Fidelity is deemed

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With regard to the fiduciary duty investment advisers owe investment companies under federal securities statutes, the parties agree that Respondent Fidelity owes a fiduciary duty to the Respondent Funds. Zang's assertion that this fiduciary duty requires Fidelity to act in the interest of the Funds at all times, and that therefore, when Fidelity considers whether to discharge a Fidelity employee who services a Fidelity Fund, it is acting on behalf of and in the interest of Fidelity Funds is an oversimplification. Owing a fiduciary duty does not mean that every action Respondent Fidelity takes is an action by the Respondent Funds. *Productive Automated Sys. Corp. v. CPI Sys. Inc.*, 61 F3d 620, 621 (8th Cir. 1995). To establish Respondent Fidelity is a covered employer as an agent of Respondent Fidelity Funds, Complainant must establish that Respondent Fidelity was acting on behalf of Respondent Funds with regard to employment matters involving Fidelity employees including taking adverse action against him.

In attempting to show that Respondent Funds exercised control of employment matters at Respondent Fidelity, Zang asserts that Fidelity acts as the Funds agent with respect to employment matters, and that the Fund Board influenced the terms and

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an agent of Respondent Funds with regard to this provision of the management services contracts, Respondent Fidelity is not covered by Section 806 unless the agency involves control of or participation in employment matters affecting employees of Respondent Fidelity.

conditions of his employment. Zang contends that because Stephen Jonas, the retired executive director of Respondent Fidelity, was also an "interested" trustee on the Fidelity Fund Board of Trustees, testified that he "was trying to do the best thing [he] could for . . . the Funds all the time" that there is a genuine issue of material fact tending to show Respondent Fidelity makes personnel decisions as an agent of the Fidelity Funds and acts in the best interests of the Funds. Zang Supp. Opp. at 14-15, 17; Resp. Supp Reply Ex 3 at 13-15, 17 (Jonas Dep.). However, this is a selective and incomplete reading of Mr. Jonas' testimony. Indeed, Mr. Jonas stated that personnel actions were specifically within his responsibility as head of Respondent Fidelity but that personnel actions have never been acted upon by the Respondent Fidelity Funds Board of Trustee in its oversight role. *Id.* at 104. Mr. Jonas stated explicitly that the day-to-day activity of the Fidelity employees was not subject to the direction or control of Respondent Funds' Board of Trustees. These day-to-day actions in which the Respondent Funds Board played no role, included the selection of fund managers, what the research staff was, which sectors or industries a Fidelity employee was assigned to, the individuals hired as traders, how Fidelity shared information, compensated its staff, specifics regarding incentives, and resource allocation. *Id.* at 110. Mr. Jonas' testimony on this point was not contradicted. Respondent Fidelity's Rule 30(b) witness, Dana Lombari, Vice President of Fidelity's human resources department, confirmed Jonas testimony by stating that the Fund's

Trustees did not participate in "decision-making regarding individual employees" and had "no role in the discipline of [Fidelity] employees." Resp. Supp. Reply, EX 1 at 155:7-9 and 130:9-12.[18]

Zang also points to the August 2005 Semi-Annual Report which indicates the Respondent Fidelity Funds Board had discussions with Respondent Fidelity throughout the year over the research, fund performance and compliance with internal policies related to gifts and entertainment, as evidence that the trustees participated in a process that led to a reorganization at Fidelity. Zang Supp. Opp. at 17-18. The Semi-Annual Report further states the Fidelity Funds Board noted with favor Fidelity's recent reorganization of its senior management team and plans for additional resources for investment research, and participated in the process that lead to those changes. *Id.* The testimony of Fidelity's Rule 30(b) witness, Ms. Lombardi, shows however, that Respondent Funds

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[18] Nor does the Congressional testimony of Marvin Mann, a former independent trustee of Fidelity Funds, suggest that Respondent Fidelity was acting as Respondent Funds agent when it terminated the Complainant. In his testimony, Mr. Mann explained that the independent trustees were required to independently analyze fund performance in their oversight role. In performing this duty, the Trustees would on occasion meet with the portfolio managers of the different funds. However, this does not show that Respondent Funds were involved in or controlled the employment decisions of Fidelity. Indeed, Mr. Mann explicitly stated that the Trustees "should not be involved in the day-to-day management affairs of the company." Resp. Supp. Reply, Ex 6 at 3.

was not responsible for the reorganization, but that the reorganization decision was made by officials and senior management of Respondent Fidelity. Resp. Supp. Reply Ex 1 at 71:5-10. She explained that the Fund Board and Fidelity had ongoing discussions regarding both parties' dissatisfaction with the performance of the Fidelity Funds, but that the management changes in 2005 were not made at the suggestion or request of the Fund Board. Mr. Rathberger, the Respondent Funds Rule 30(b) witness, testified in conformity with Ms. Lombardi's statements as he said the Fund Board of Trustees did not make a request for change in management, but rather listened to Fidelity's plan to improve matters. Resp. Supp. Reply, Ex 2 at 65:4-22, 66:1-17. In light of the corporate witnesses' uncontradicted testimony regarding the interaction/discussions between Respondent Fidelity and Respondent Funds on the investment performance results referred to in the annual report, the annual report does not raise an issue of material fact suggesting that Respondent Funds exercised control over employment matters at Respondent Fidelity.

The Complainant next contends that because the Board/Trustees of Respondent Funds can elect and remove officers of the Respondent Funds and because all Respondent Fund officers are employees of Fidelity, that Respondent Funds have the authority to effect the terms and conditions of employment of Fidelity employees. This argument is not persuasive. The declaration of trust provides that the Fidelity

Funds Board elects and removes officers of the various funds. The officers are proposed by Respondent Fidelity, but must be approved and elected by the Respondent Fund Board. The officer positions are simply honorary positions that carry with them no specific duties or day-to-day responsibilities. Resp. Supp. Reply, Ex 2 at 147:16-18, 150:22, 151:1-22, 156:2-21. These honorary officers are appointed annually by the Board. Based on this evidence, I find that the Board's annual election of some Fidelity employees to honorary officer positions in the Funds which carry no day-to-day responsibilities or specific duties does not affect the terms and conditions of employment of Fidelity's employees.

Complainant next argues that officers of Respondent Funds influenced the terms and conditions of his employment. There is no dispute that Mr. Jonas, who was executive director of Respondent Fidelity and an interested Trustee of Respondent Funds, approved Zang's termination. Under his theory that Mr. Jonas had a fiduciary duty to act in the interest of Respondent Funds, Zang argues Mr. Jonas was acting in furtherance of this duty when he approved Zang's termination. However, this argument is wide of the mark. Mr. Jonas wore two hats, he was the senior management official at Respondent Fidelity and he was also an interested Trustee of Respondent Funds. The Complainant's argument obfuscates the separate responsibilities Jonas had in the two positions. The fact that Mr. Jonas was both the senior executive at Respondent Fidelity and a

trustee of the Fidelity Fund Board does not mean that every action he took as executive director of Fidelity can be attributed to the Funds. As discussed above, Mr. Jonas's testimony that his approval of Complainant's discharge was sought and provided in his position as an executive and officer of Respondent Fidelity and not as a Trustee of Fidelity Funds was not refuted by Complainant.[19]

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[19] Zang makes similar arguments with regard to the actions of several other individuals who were direct employees and management officials of Respondent Fidelity, and who may also have been officers of one or more of the Fidelity Funds or Fund Board members. Specifically, Zang assertion that John McDowell, senior vice-president at Respondent Fidelity Management and Research Company, received a copy of a written warning given to Zang in McDowell's capacity as Vice President of Fidelity Trend Fund, was put to rest by Ms. Lombardi. She stated that Mr. McDowell received a copy of Zang's written warning from Ms Collins who reported to him in her capacity as group leader of Equity Research at Fidelity. As McDowell had responsibility for equity investments at Respondent Fidelity, he was informed in the normal chain of management command of the decision to issue Zang a warning. Resp. Supp. Reply Ex 1 at 124:15-20. In addition, Zang contends that Mr. Greer, senior vice president, Equity Research and Asset Allocation at Fidelity, who was also selected as vice president of Fidelity Funds Select and Asset Allocation funds, made the decision to terminate him and as an officer of two Fidelity mutual funds this shows the Fidelity Funds exercised control over his employment. Again, Zang attempts to combine the two separate positions Mr. Greer held. The fact that Mr. Greer's duties as Vice President of Equity Research and Asset Allocation at Fidelity would include authority to terminate Zang or other Fidelity employees, does not mean that actions he took in this position may be attributed to him in his position as an officer of two Fidelity Funds. In his initial opposition to summary decision, Zang also contended that two

(Continued on following page)

A portion of the compensation awarded to Respondent Fidelity analysts and portfolio managers is determined based upon a portfolio manager ("PM") survey. Zang Supp Opp. at Ex 42. The PM survey is completed by portfolio managers and rates each research analyst, including Complainant. *Id.* at Ex 38, Nos. 14, 15. Portfolio managers are Fidelity employees. As noted, some portfolio managers also serve as honorary officers of specific Fidelity Funds. The participation of Fidelity portfolio managers, some of whom may also be honorary officers of specific Fidelity Funds, in the PM survey of Zang's performance, does not establish that officers of Fidelity Funds influenced the terms of his employment. The Portfolio Managers participated in the PM survey as employees of Fidelity. There is no evidence that their honorary positions as officers in a specific Fidelity Fund conferred authority upon them to act on employment matters involving Fidelity employees.

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letters he received from Edward C. Johnson, 3d, who was Chief Executive Officer of Respondent Fidelity and an interested trustee of the Fidelity Funds regarding Zang's entitlement to a bonus and incentive shares in FMR Corp. establish that the Fidelity Funds Board is involved in employment matters regarding Fidelity employees. The letters from Johnson were sent to Zang in Johnsons' capacity as head of Respondent Fidelity and at least one lists Johnson's Fidelity titles. Again, the fact that an individual involved in either an adverse or positive employment decision affecting Zang or any other Fidelity employee, may hold both a management position at Respondent Fidelity and a position as an officer of one of the Fidelity Funds or trustee of Respondent Fidelity Funds' Board, does not establish that the Funds controlled Zang's employment.

After careful consideration of the parties' arguments and the evidence submitted, I find that Zang has failed to show there is a question of material fact in dispute as to Respondent Funds control or participation in employment decisions involving Respondent Fidelity employees.

E. Is Respondent Fidelity a Contractor of Respondent Fidelity Funds?

There is no dispute that Respondent Fidelity has a management and investment services contract with Respondent Fidelity Funds. Congress did not define the term "contractor" when it enacted Section 806 of the Act. *Blacks' Law Dictionary* defines the terms as "one who contracts to do work or provide supplies for another." 7th ed (St. Paul: West Pub Co., 1999) 327. The Department of Labor's ARB has not had occasion to determine the nature of a contractual relationship which may be sufficient to demonstrate coverage as a contractor for purposes of the whistleblower provisions of Sarbanes-Oxley.[20] I am not persuaded that

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[20] As noted above, several administrative law judge decisions have determined that simply having a contract with a publicly traded company is not sufficient to impose liability under the whistleblower provision in Section 806 of the Act. Rather, the contractor "when discriminating against the employee must have been acting on **behalf** of the publicly traded company." *Reno*, 2006-SOX-00030, 3 (ALJ Feb. 23, 2006); see also *Goodman*,, 2006-SOX-00011, 10 (ALJ Jan. 10, 2006) (construing term "employee" as referring to employee of a publicly traded company, and stating that "the terms 'contractor'

(Continued on following page)

simply having a contract with a publicly traded company envelops a private company under Section 806 of the Act.[21] Even the Complainant appears to concede this point, stating that he "does not propose that this Court deem every privately-held company that has a contract with a publicly-traded company a covered employer." Zang Supp. Opp. at 9, n 13. In light of the ARB's *Klopfenstein* decision, which concluded that an agent of a publicly traded company may be a covered employer under Sarbanes-Oxley, it appears that a contractor of a publicly traded company may, in certain circumstances, be deemed a covered employer under Section 806. Upon consideration of earlier decisions considering "contractor" coverage under Section 806 and the ARB's *Klopfenstein* analytical approach to the term "agent" appearing in the same statutory phrase, I conclude that in order for a contractor of a publicly traded company to be covered

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and 'subcontractor' in the provision reference two of various entities of a publicly traded company that may not adversely affect the terms and conditions of an employee of a *publicly traded company*.") (emphasis in orig.); *Minkina*, 2005-SOX-00019, 6 (ALJ Feb. 22, 2005) (stating Section 806's reference to "any officer, employee, contractor, subcontractor, or agent of such company" "simply lists the various potential actors who are prohibited from engaging in discrimination on behalf of a covered employer"); *Flesar v. Am. Medical Ass'n*, 2007-SOX-00030, 3 (ALJ June 13, 2007) (non public employer's contractual relationships with publicly traded company insufficient to establish SOX coverage).

[21] Such a construction of Section 806 would extend Section 806 to any private company that had a contract with a publicly traded company.

under Section 806, the contractor must have been acting on behalf of the publicly traded company when it retaliated against or terminated the employee.

In support of his assertion that Respondent Fidelity is a contractor of Respondent Funds and therefore a covered employer, the Complainant makes many of the same arguments he raised in asserting coverage as an agent. As noted, Respondent Fidelity has a management contract with Respondent Fidelity Funds under which Fidelity performs significant management and administrative services for the Fidelity Funds. Among the services Fidelity provides to the Funds are directing the investments of each fund in accordance with its investment objectives and providing all necessary office facilities, equipment and personnel. Complainant contends Respondent Fidelity as an investment adviser acts as a fiduciary with regard to the services it provides Respondent Funds and therefore Respondent Fidelity acts on behalf of and in the interest of Respondent Fidelity at all times. While Fidelity as an investment adviser no doubt has a fiduciary responsibility to act in the interest of Respondent Fidelity Funds, under the Investment Advisers Act as well as SEC regulations, Zang overstates the reach of the duty with regard to the application of Section 806. Thus, I conclude that the fiduciary duty Respondent Fidelity owes Respondent Fidelity Funds under SEC regulations is insufficient in and of itself to show that Fidelity's actions are the actions of the Fidelity Funds under Section 806. Under Section 806 as interpreted by the

ARB, the Complainant must show that Respondent Fidelity as a contractor was acting on behalf of Respondent Fidelity Funds in employment matters, and specifically, when it terminated the Complainant's employment.

As noted in the discussion of agency above, pursuant to the management contract Respondent Fidelity as a contractor for Respondent Fidelity Funds is responsible for hiring employees under the management services contract between the parties. Fidelity makes hiring decisions, decisions related to work assignments, pay and compensation of employees and Fidelity Funds have no role in these matters as related to Fidelity employees.

Finally, Complainant's argument that because the contract requires Respondent Fidelity to prepare the Respondent Funds registration statements and shareholder reports it is necessary to protect Fidelity employees from retaliation is unpersuasive. Although Respondent Fidelity prepares shareholder reports and other public filings on behalf of Respondent Fidelity Funds, the Fidelity Funds are responsible for reviewing and certifying the public filings drafted by Fidelity employees.

F. Are Respondent Fidelity and Respondent Fidelity Funds An Integrated Enterprise

The Complainant contends that summary decision is inappropriate as Respondents Fidelity and

Respondents Fidelity Funds are a single integrated enterprise. Zang Supp. Opp. at 22-29. Respondents argue that Fidelity and the Fidelity Funds are not an integrated enterprise/single employer. Resp. Supp. Reply at 33-45. The ARB has not ruled on whether the integrated enterprise analysis used in labor and employment cases, to determine whether two companies may be considered so interrelated as to constitute a single employer subject to liability under the specific statute, is appropriate for determining coverage under the Section 806's whistleblower protection provision.[22] Courts evaluate four factors in determining whether there is an integrated enterprise: (1) functional integration of operations; (2) centralized control of labor or employment decisions; (3) common management; and (4) common ownership or financial control. *Radio and Television Broadcasting Tech. Local Union 1264 v. Broadcast Serv. Of Mobile, Inc.*, 380 U.S. 255 (1965); *Pearson v. Component Tech Corp.*, 247 F. 3d 471, 486 (3d Cir. 2001); Rivas v. Federacion de Asociaciones Pecuarias de Puerto Rico, 929 F.2d 814, 820 (1st Cir. 1991). The most important factor in employment cases is control or influence

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[22] In an amicus brief to the ARB in *Ambrose v. U.S. Foodservice, Inc.* ARB No. 06-096, ALJ No. 2005-SOX-105, the Assistant Secretary of Labor for the Occupational Safety and Health Administration argued that the Board should apply the integrated enterprise doctrine in determining Section 806 coverage of private subsidiaries of publicly-traded companies. Resp. Supp. Reply, Ex 7. The parties settled the matter before the ARB issues a decision on the merits. ARB No. 06-096, ALJ No. 2005-SOX-105 (ARB Sept. 28, 2007).

over employment matters. Courts have found centralized control where "entities share policies concerning hiring, firing, and training employees, and in developing and implementing personnel policies and procedures." *Lenoble v. Best Temps, Inc.* 352 F. Supp. 2d 237, 244 (D. Conn. 2005); *see also, Romano v. U-Haul International*, 233 F.3d 655, 666 (1st Cir. 2000).

As this matter involves employment issues, the most important factor is whether centralized control of employment decisions exists between Respondent Fidelity and Respondent Fidelity Funds. After careful consideration of the parties' submissions, I conclude that Zang has failed to sustain his burden of showing that Fidelity and the Funds are an integrated enterprise or that there are material facts in dispute with regard to this issue.

1. Centralized Control of Employment Matters

In his effort to demonstrate a factual dispute, Zang contends that the hiring of Mr. Rathgeber is an example of Fidelity and the Fidelity Funds acting as an integrated enterprise with regard to employment. Zang Supp. Opp. at 25. Mr. Rathgeber serves as the Chief Compliance Officer ("CCO") of Fidelity Funds and he is also the Vice President of Risk Oversight and Audit for Respondent FMR Corp. (Fidelity). Resp. Supp. Reply, Ex 2 at 185:19-21, 186:1-5, 18, 187:1, 5-6. Mr. Rathgeber first became head of Risk Oversight and Audit for Respondent FMR Corp. (Fidelity) in

2002. *Id.* at 185:19-21. In 2004, Mr. Rathgeber was also appointed as Fidelity Funds Chief Compliance Officer ("CCO") pursuant to the then new SEC Rule 38a-1, which required investment companies such as Fidelity Funds to appoint a CCO and to adopt procedures and practices to ensure compliance with federal securities laws.[23] *Id.* at 187:5-6. In his position as CCO of the Funds he reports directly to the Fund Board. As he holds a position with both Respondent Fidelity and Respondent Funds, the independent chair of the Fund Board Trustees along with Rathgeber's superior in his position as VP of Risk Oversight for Fidelity, provide input on his performance and compensation review. *Id.* at 34:2-3, 35:7-22, 36:1-22, 38:3-15. Mr. Rathgeber's salary is paid by Fidelity as reflected on his W-2. *Id.* at 35:1-4. The CCO position with Fidelity Funds is an appointed position. At most, Mr. Rathgeber's holding a position at Respondent Fidelity and serving as the appointed CCO for the Respondent Funds suggests that Mr. Rathgeber is employed by both Respondent Fidelity and by Respondent Fidelity Funds.

Complainant also asserts that the Fidelity Funds play "an active role in overseeing the appointment of fund managers." Zang Supp. Opp. at 19. However, this assertion is not supported by the discovery

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[23] Rule 38a-1 requires investment companies to appoint a Chief Compliance Officer ("CCO") who is responsible for investigating and reporting on the company's compliance with securities law.

results herein. The Fidelity Fund Board approves the appointment of certain Portfolio Managers as officers of the Fidelity Funds. As discussed, these officer positions are honorary positions which carry no additional or specific responsibilities or duties and a Fidelity Portfolio Manager's role as officer of a Fidelity Fund did not have any effect upon the terms and conditions of his employment as a Respondent Fidelity Portfolio Manager. The Fidelity Fund Trustees do not have authority to select Fidelity Portfolio Managers and are not involved in Fidelity's employment decisions with respect to which employees would become Portfolio Managers. In addition, Fidelity's corporate witness testified that Fidelity's personnel policies applied only to Fidelity employees acting in their capacity as Fidelity employees and her testimony was not contradicted.

The evidence shows Zang was hired by Fidelity, his work assignments were made by Fidelity, his compensation and performance appraisals were determined by Fidelity employees and officials. Contrary to Zang's assertion, the evidence does not show that Respondent Funds played any role in Zang's termination from Respondent Fidelity. As noted, Mr. Jonas a trustee of Respondent Funds was also the Executive Director of Respondent Fidelity at the time of Zang's termination. While Mr. Jonas was consulted regarding the decision to terminate Zang, the undisputed evidence demonstrates he was consulted in his position as the top executive at Respondent Fidelity and not in his role as a trustee of

Respondent Fidelity Funds. Therefore, the evidence does not show that the Fidelity Fund Board was involved in the decision to terminate Zang or in any matters related to his employment at Fidelity.

Mr. Zang interacted with the Board of Respondent Funds on three occasions when he participated in the annual presentation to Respondent Funds Board on the Fidelity Select Funds he managed as a Fidelity research analyst or portfolio manager. These presentations were made in the course of the Fund Board's exercise of its responsibility to oversee the performance of the Fidelity Funds. In my view, three annual presentations to the Board on the performance of the funds he managed is not sufficient to establish centralized control of employment nor does it show a question of material fact on this issue.

After considering the parties submissions, Zang has shown that with respect to Mr. Rathgeber, it can be argued that Fidelity and the Funds have jointly employed him. However, Mr. Rathgeber is the only employee with this dual employment status.[24] All other Fidelity employees are employed solely by Fidelity and the Fidelity Funds do not have any other direct employees. In light of the evidence that Zang's and other Fidelity employees' employment including assignments, discipline, pay and benefits were controlled by Fidelity and that the Respondent Funds

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[24] His appointment as CCO of the Funds is a consequence of SEC Rule 38(a)-1.

were not involved in such employment decisions, involving Zang and other Fidelity employees, I conclude Respondent Fidelity and the Funds do not have centralized control of employment matters. I will briefly consider the other factors utilized in determining whether two companies operate as an integrated enterprise.

2. Integration of Operations

In evaluating whether there is an interrelation of operations, courts look to whether one company has influenced or interfered with the business operations of another company. *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 778 (7th Cir. 1997). In the present matter, the Fidelity Funds do not have employees and instead must contract with other companies to handle investment, management and administrative services required to operate the Funds. Respondent Fidelity and Respondent Funds business relationship is governed by the management contracts. As noted, the Fidelity Fund operates independently through its Board. There is no evidence that the Fidelity Fund Board is involved in day-to-day decisions related to Fidelity's business operations.

3. Common management

The evidence does not demonstrate that Respondent Fidelity and Respondent Fidelity Funds share common management. Although some individuals held positions at both Respondent Fidelity and

Respondent Funds, this does not establish common management. At the time of Zang's termination, ten of the fourteen Fund Board members were independent. This overlap between some Fund Board members and officials at Fidelity fails to show common management. *Sandoval v. The City of Boulder*, 388 F.3d 1312, 1324 (10th Cir. 2004) (no common management when city controlled two of seven seats on an organization's board). Zang also claims that an article appearing in the Wall Street Journal in which Edward Johnson, 3rd stated "[m]andating an independent chairperson is akin to requiring that every ship have two captains. I don't know about you, but if a ship I was sailing on were headed for an iceberg, I'd want one – and only one-captain giving orders" shows common management. Zang Supp. Opp. at 27, Ex 25. Johnson's article was addressing a proposed SEC rule to require that all mutual fund board chairpersons be independent. He expressed his view that an independent chairman of the board is not necessarily better than having a chairman who also has a financial interest in the fund's management company. Johnson believes that Fidelity's interests and the Funds interests are aligned, and that the appointment of the chairman of the Fund board should remain with the Board trustees and not be mandated by the SEC.[25] Underlying Johnson's position that the

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[25] Johnson also notes that the Fund Board, which is independent, has the authority to vote him out as Chairman if he does not deliver value for shareholders.

selection of Board chairman should remain with the Board, is the notion that the Fund Board acts independently of Fidelity. Clare Stack Richer, a Fidelity 30(b) witness, reiterated that Fidelity holds the view that the selection of the Chairman of the Funds Board should remain the province of the Funds Board of Trustees, who are free to select either an independent or interested person, and should not be mandated by the government. Resp. Supp. Reply, Ex 9 at 170:3-5.

4. Common Ownership

With regard to common ownership or financial control, Zang failed to demonstrate common ownership between Respondent Fidelity and Respondent Fidelity funds. As Zang acknowledges, mutual funds are owned by their investor shareholders and investment advisers may be privately owned. Zang Supp. Opp. at 28. The fact that Edward Johnson, 3rd holds an ownership interest in Respondent Fidelity as well as his ownership of shares issued by Respondent Fidelity Funds does not establish common ownership. Accordingly, I conclude that Complainant has failed to show either that Respondent Fidelity and Respondent Fidelity Funds are an integrated enterprise, or that there is a material fact in dispute on this issue.

In summary, viewing all of the evidence and the factual inferences in the light most favorable to the Complainant, I find that he has failed to make a

showing sufficient to establish that Respondent Fidelity acted as an agent or contractor of Respondent Fidelity Funds, or that the two entities operated as an integrated enterprise, in employment matters. Since Respondent Fidelity is not a covered employer itself, nor an agent or contractor in regard to employment matters, and Respondent Fidelity and the Funds are not an integrated enterprise, the Complainant is unable to establish that he is a covered employee under the whistleblower protection provisions of Section 806 of the Act. Consequently, I conclude that there is no genuine issue of material fact in dispute. Accordingly, the complaint must be dismissed.

SO ORDERED.

Colleen A. Geraghty
Administrative Law Judge

Boston, Massachusetts

PETITIONER'S BRIEF

No. 12-3

Supreme Court, U.S.
FILED
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In The Supreme Court of the United States

JACKIE HOSANG LAWSON and JONATHAN M. ZANG,

Petitioners,

v.

FMR LLC, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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QUESTION PRESENTED

Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, forbids a public company or "any ... contractor [or] subcontractor ... of such company [to] ... discriminate against an employee in the terms and conditions of employment because of" certain protected activity. The question presented is:

> Is an employee of a privately-held contractor or subcontractor of a public company protected from retaliation by section 1514A?

PARTIES

The petitioners are Jackie Hosang Lawson and Jonathan M. Zang.

The respondents are FMR LLC, FMR Co. Inc., FMR Corp., Fidelity Brokerage Services, LLC, and Fidelity Management & Research Company. All of the respondents are privately-held companies.

No Fidelity mutual fund is a party to this action.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties	ii
Opinions Below	1
Jurisdiction	1
Statutory Provisions and Regulations Involved	2
Statement of The Case	2
Summary of Argument	8
Argument	11
I. The Statutory Scheme	11
II. The Text of Section 1514A Protects Employees of Contractors From Retaliation by Their Employer	14
A. A Statute Governing How A Company Treats An "Employee" Applies To That Employer's Treatment of Its Own Employees	15
B. A Statute That Forbids A Company To "Discriminate Against An Employee In The Terms and Conditions of Employment" Prohibits Discrimination In The Terms and Conditions of Employment At That Company	21
C. Numerous Other Provisions of Section 1514A Support The Conclusion That The Statute Protects Employees of Contractors	32

TABLE OF CONTENTS – Continued

Page

III. The Three Headings In Section 806 of Sarbanes-Oxley Do Not Support A Narrower Reading of Section 1514A 41

IV. Interpreting Section 1514A To Forbid Retaliation Against Employees of Contractors Is Necessary To The Viability of Other Provisions of Sarbanes-Oxley 49

V. Protecting Employees of Contractors From Retaliation Is Essential To Achieving The Purposes of Sarbanes-Oxley..... 53

VI. The Administrative Review Board Decision In *Spinner* Is Entitled To *Chevron* Deference 61

Conclusion..... 63

Appendix

Statutes and Regulations Involved.....1a

TABLE OF AUTHORITIES

Page

CASES

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 47

Bechtel v. Competitive Technologies, 448 F.3d 469 (2d Cir. 2006) 49

Brotherhood of Railroad Trainmen v. Baltimore & O.R.Co., 331 U.S. 519 (1947) 47, 48

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) 23, 24

Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984) 10, 61

Dean v. United States, 556 U.S. 568 (2009) 33

Evans v. Miami Valley Hospital, 2009 WL 1898238 (ARB June 30, 2009) 31

INS v. National Center for Immigrants' Rights, Inc., 502 U.S. 183 (1991) 47

Kasten v. Saint-Gobain Performance Plastics Corp., 131 S.Ct. 1325 (2011) 17

Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dep't of Labor, 717 F.3d 1121 (10th Cir. 2013) 62

Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318 (1992) 16

Pennsylvania State Police v. Suders, 542 U.S. 129 (2004) 23

Robinson v. Shell Oil Co., 519 U.S. 337 (1997) 15

TABLE OF AUTHORITIES – Continued

Page

Russello v. United States, 464 U.S. 16 (1983)..... 33

Spinner v. David Landau and Associates, LLC, 2012 WL 2073374 (ARB May 31, 2012).....7, 10, 22, 61, 62

United States v. Mead Corp., 533 U.S. 218 (2001)..... 61

Welch v. Chao, 536 U.S. 269 (4th Cir. 2008) 62

Wiest v. Lynch, 710 F.3d 121 (3d Cir. 2013)..... 12, 62

STATUTES AND RULES

5 U.S.C. § 554 62

12 U.S.C. § 1790b(a)(1)..... 19

12 U.S.C. § 1790b(a)(2)..... 19

12 U.S.C. § 1831j(a)(2)..... 20

12 U.S.C. § 5567 20

15 U.S.C. § 78l 11, 12

15 U.S.C. § 78o(d) 2, 11, 45

15 U.S.C. § 2087 20

15 U.S.C. § 7202(b)(1)..... 52

15 U.S.C. § 7211(c)(2)..... 52

15 U.S.C. § 7213 52

15 U.S.C. § 7217(b)(2)..... 52

15 U.S.C. § 7242 51

15 U.S.C. § 7245(1)..... 49

TABLE OF AUTHORITIES – Continued

Page

15 U.S.C. § 7245(2) 49
15 U.S.C. § 7263 40
15 U.S.C. §§ 7701 *et seq* 52
18 U.S.C. § 1341 13
18 U.S.C. § 1343 13
18 U.S.C. § 1344 13
18 U.S.C. § 1348 13
18 U.S.C. § 1514A ..... *passim*
18 U.S.C. § 1514A(a) ..... *passim*
18 U.S.C. § 1514A(a)(1) 41, 47, 50, 51, 52
18 U.S.C. § 1514A(a)(1)(A) 13
18 U.S.C. § 1514A(a)(1)(B) 13
18 U.S.C. § 1514A(a)(1)(C) 13
18 U.S.C. § 1514A(a)(2) 33, 37, 38, 47
18 U S.C. § 1514A(b) 14, 23, 61
18 U.S.C. § 1514A(b)(1)(A) 14
18 U.S.C. § 1514A(b)(1)(B) 14
18 U.S.C. § 1514A(b)(A) 61
18 U.S.C. § 1514A(b)(2) 20, 62
18 U.S.C. § 1514A(b)(2)(A) 34
18 U.S.C. § 1514A(c) 14
18 U.S.C. § 1514A(c)(2)(A) 36
18 U.S.C. § 1520(a)(2) 52

TABLE OF AUTHORITIES – Continued

Page

20 U.S.C. § 3608 20
20 U.S.C. § 4018 19
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1292(b) 7
29 U.S.C. § 215(a)(3) 17
29 U.S.C. § 660(c)(1) 17
30 U.S.C. § 1293(a) 17
31 U.S.C. § 5328(a) 20
33 U.S.C. § 948a 15
33 U.S.C. § 1367(a) 17
42 U.S.C. § 6971(a) 17
42 U.S.C. § 9610 17
46 U.S.C. § 80507(a) 17
49 U.S.C. § 30171 20
49 U.S.C. § 31105(a) 17
49 U.S.C. § 42121 ..... 20, 44
49 U.S.C. § 42121(a) 20, 44
49 U.S.C. § 42121(b) ..... *passim*
49 U.S.C. § 42121(b)(2)(A) 62
49 U.S.C. §§ 42121(b)(2)(B)(i)-(iv) 23, 35
49 U.S.C. § 42121(b)(3)(B) 36
49 U.S.C. § 42121(b)(6)(A) 36

TABLE OF AUTHORITIES – Continued

Page

Pub. L. 107-209, § 806(b), 116 Stat. 802 (2002) 42

Pub. L. 111-203, § 922(a), 124 Stat. 1376 (2010)..... 50

Pub. L. 111-203, Title IX, § 929A, 124 Stat. 1376 (2010)..... 11

17 C.F.R. §§ 210.2-01 to -07 .....*passim*

29 C.F.R. § 1980.110..... 14

OTHER AUTHORITIES

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Richard A. Oppel, Jr., "Merrill Replaced Research Analyst Who Upset Enron," New York Times, July 30, 2002 29

OPINIONS BELOW

The February 3, 2012 opinion of the Court of Appeals, which is reported at 670 F.3d 61 (1st Cir. 2012), is set out at pp. 1a-75a of the Petition Appendix. The April 6, 2012 order of the Court of Appeals denying rehearing and rehearing en banc, which is not reported, is set out at pp. 134a-135a of the Petition Appendix. The March 31, 2010 Memorandum and Order of the District Court for the District of Massachusetts, which is reported at 724 F.Supp.2d 141 (D.Mass. 2010), is set out at pp. 76a-133a of the Petition Appendix.[1]

JURISDICTION

The decision of the Court of Appeals was entered on February 3, 2012. A timely petition for rehearing and rehearing en banc was denied on April 6, 2012. This Court granted certiorari on May 20, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

[1] The District Court opinion certifying the question in this case for interlocutory appeal is reported at 724 F.Supp.2d 167 (D.Mass. 2010).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The statutory provisions and regulations involved are set out in the Appendix.

STATEMENT OF THE CASE

Eleven years ago, in the wake of the Enron collapse and other financial scandals, Congress enacted the Sarbanes-Oxley Act of 2002 ("SOX"), one section of which protects whistleblowers from retaliation. 18 U.S.C. § 1514A. This case presents an important question about the scope of that anti-retaliation provision.

The defendants are the privately-held parent company and several subsidiary companies that operate the Fidelity family of mutual funds, one of the largest mutual fund company in the United States, investing approximately $1.6 trillion on behalf of millions of fund investors. Each of the hundreds of Fidelity mutual funds is a separate registered investment company required to file reports with the Securities and Exchange Commission ("SEC") under section 15(d) of the Securities Exchange Act of 1934. 15 U.S.C. § 78o(d). At Fidelity, as is true of the mutual fund industry generally, a mutual fund itself has no employees of its own. Rather, the directors of the mutual funds contract with an "investment adviser," which in turn conducts all the activities of the funds, making day to day investment decisions, performing a range of management and administrative tasks,

and preparing reports for shareholders and filing reports with the SEC. Employees in the mutual fund industry ordinarily work for a mutual fund adviser or sub-advisers or other subcontractors, not for a mutual fund itself. The defendants in this case are investment advisers, or sub-advisers, or related subcontractors to Fidelity mutual funds. The defendants do business as Fidelity Investments; for convenience we refer to all the defendants as Fidelity Investments.

Jackie Hosang Lawson was a Fidelity Investments employee for fourteen years; at the time of the events giving rise to this action Lawson was a Senior Director of Finance. Beginning in 2005, Lawson raised a series of objections to the manner in which Fidelity Investments was calculating the expenses that it reported as having been incurred in carrying out their contractual obligations to operate those funds. The amount of those expenses affected the amount of profit reported by Fidelity Investments, which in turn was a measure used by the Mutual Fund Board in determining the fee to be paid to Fidelity Investments. By inflating its expenses, and thus understating its profits, Fidelity Investments could potentially increase the fees it would earn from the mutual funds, fees ultimately paid by the shareholders of those funds. Lawson objected both to the manner in which the expenses had been calculated and to the failure of Fidelity Investments to disclose the disputed methodology to the Trustees,

Directors or Audit Committee of the Fidelity Mutual Funds.[2] When Fidelity Investments officials persisted in this misallocation of expenses, Lawson wrote to Fidelity Investments' General Counsel, explaining the problem and expressing the concern that the scheme constituted fraud against the mutual funds' shareholders. Lawson reported a number of these matters to the SEC. Lawson also reported to both the SEC and Fidelity Investments' legal counsel that a group within Fidelity Investments had improperly retained $10 million in fees that belonged to third-parties and had done so without disclosing its actions to the Fidelity Funds' Board of Trustees. (Pet.App. 80a n.2). Lawson also reported to Fidelity Investments' counsel that one of the Fund's Annual Reports to shareholders, written by Fidelity Investments and filed with the SEC, was in several respects false and misleading.

In response to her repeated objections, Lawson was subjected to a series of adverse actions. Lawson filed complaints about this retaliation with the Occupational Safety and Health Administration ("OSHA") of the Department of Labor, the federal agency responsible for investigating claims of violations of section 1514A. 18 U.S.C. § 1514A. In July 2007, a

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[2] The complaint alleged that approximately $100 million of expenses incurred by Fidelity Investments for providing advice to prospective customers was improperly allocated as a service expense for existing shareholders.

supervisor at Fidelity Investments advised Lawson that she should take a "sabbatical" because "it was impossible for her to continue working at Fidelity Investments because of the claims she had made to OSHA and the SEC."[3] In November 2007 Lawson resigned, contending that the defendants' campaign of harassment had made her working conditions intolerable.

Jonathan Zang worked for several of the defendants, most recently as an equity research analyst. Zang's complaint alleged that in early 2005 he objected to a draft Statement of Additional Information which Fidelity Investments filed with the SEC on behalf of a Fidelity fund. Zang pointed out that the Statement contained misleading information about the manner in which portfolio managers were compensated. After several emails and a meeting between Zang and higher officials, Fidelity Investments agreed to revise the Statement along the lines Zang had urged. During the same period Zang also objected that Fidelity Investments was operating several "veiled index funds," funds which are essentially unmanaged index funds but for which Fidelity Investments was improperly collecting a fee for active management that had not really occurred. In June 2005, two months after Fidelity Investments had submitted the revised Statement to the SEC, Fidelity

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[3] Lawson Amended Complaint, ¶ 65.

Investments fired Zang. Zang, like Lawson, filed a complaint with OSHA.

Lawson and Zang ultimately commenced the instant actions in federal district court, asserting that they had been retaliated against by Fidelity Investments in violation of section 806 of the Sarbanes-Oxley Act. 18 U.S.C. § 1514A. Section 1514A prohibits certain public companies, including mutual funds, as well as contractors of such companies from retaliating against an "employee" who engages in protected activity. Fidelity Investments moved in each case to dismiss the complaint on the ground that Lawson and Zang were not "employee[s]" within the meaning of section 1514A. Fidelity Investments did not dispute that mutual funds are public companies subject to section 1514A, and that fund advisers are contractors of such companies. It argued, however, that the "employee[s]" protected from retaliation by section 1514A are limited to employees of public companies themselves, and do not include individuals who work for private contractors of a public company.

The District Court denied Fidelity Investments' motions to dismiss.[4] It concluded that section 1514A does protect employees of privately held companies that are contractors of public companies such as a

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[4] Although the cases were not consolidated, the District Court considered and resolved both motions in a single decision. (Pet.App. 76a-77a).

mutual fund. (Pet.App. 96a-123a). The District Court certified for interlocutory appeal under 28 U.S.C. § 1292(b) the question of whether section 1514A protects employees of such contractors, and the court of appeals granted the petitions for interlocutory review. (Pet.App. 9a). The Department of Labor and the SEC filed amicus briefs urging the First Circuit to affirm the District Court opinion.

A divided panel of the First Circuit overturned the District Court decision and ordered the dismissal of the complaints. The majority held that an individual who works for a privately held company is not an "employee" within the meaning of section 1514A, even if that company is a contractor of a mutual fund or some other company that is covered by section 1514A. (Pet.App. 10a-51a). The First Circuit denied a timely petition for rehearing en banc. (Pet.App. 134a-35a). Two months later, in a different case, the Administrative Review Board of the Department of Labor reached the opposite conclusion, holding that employees of such contractors are protected by section 1514A. *Spinner v. David Landau and Associates, LLC*, 2012 WL 2073374 (ARB May 31, 2012) (Pet.App. 136a-99a).

This Court granted certiorari. 133 S.Ct. 2387 (2013).

SUMMARY OF ARGUMENT

Section 1514A provides that no contractor of a public company may "discriminate against an employee in the terms and conditions of employment" because the employee engaged in certain protected activity. When a statute imposes duties or restrictions on a company regarding the treatment of an "employee," the law ordinarily is referring to the company's own employees, not instead to the employees of some other firm. That meaning is especially clear here, because of the type of retaliation forbidden by section 1514A. The only "terms and conditions of employment" a contractor would normally control – and be able to modify to retaliate against a worker – are the terms and conditions of employment of its own employees.

The First Circuit erred in holding that under section 1514A a contractor is free to retaliate against its own employees, and is forbidden only to retaliate against an employee of a public company for which it works. The court of appeals interpreted section 1514A to forbid only retaliation "against an employee of such company," the words "of such company" referring to a public company. The words "of such company" are not used in the text to limit the employees protected from retaliation; that very restriction is, however, utilized earlier in the same sentence to delineate the individuals forbidden to retaliate – "any officer [or] employee ... of such company." Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally

presumed that Congress acts intentionally in the disparate inclusion or exclusion. That presumption applies with particular force to section 1514A, because the inclusion and exclusion of the phrase "of such company" appear only 22 words apart in the same sentence.

Section 1514A and the provision of the Sarbanes-Oxley Act of which it was part contain three differently worded headings. Those conflicting and abbreviated headings shed no light on the meaning of the term "employee" in section 1514A. Although two headings refer to employees of "publicly traded companies," the third heading does not refer to any particular type of employee. This reference in the first two headings cannot be an exclusive listing of the protected employees, because it omits a group of employees who unquestionably are protected – employees of public companies that are not publicly traded. As this Court has noted in the past, headings often do not and could not refer to all the matters which the framers of a section wrote into the text.

The anti-retaliation provision in section 1514A is a linchpin of the Sarbanes-Oxley Act, and its application to employees of outside firms is of central importance. Congress concluded that outside contractors – particularly accountants and lawyers – had played a major role in the Enron collapse. The accounting gimmicks utilized by Enron were approved and even devised by its auditor, Arthur Andersen. Enron's outside counsel, when informed of internal complaints about accounting irregularities, advised

the company how to legally get rid of the whistleblower, rather than attempting to do anything about the irregularities themselves. The Senate committee report observed that "[i]nstead of acting as gatekeepers who detect and deter fraud, it appears that Enron's accountants and lawyers brought all their skills and knowledge to bear in assisting the fraud to succeed and then in covering it up." The committee report noted that Arthur Andersen as well as Enron had engaged in retaliation against whistleblowing.

Under the First Circuit's narrow reading of section 1514A, if that provision had been in effect prior to the collapse of Enron, it would have been legal for Arthur Andersen to fire any employee who answered questions from the SEC or who had refused to participate in Andersen's shredding of large numbers of Enron-related documents. The framers of the Sarbanes-Oxley Act assuredly did not intend section 1514A to permit such retaliatory acts.

If the Court concludes that section 1514A is ambiguous, it should defer to the Administrative Review Board's interpretation of that provision in *Spinner v. David Landau and Associates, LLC*. *Chevron* deference is appropriate where an agency is authorized to engage in formal adjudication and its resolution of a legal issue is reasonable. Section 1514A provides such authorization. The Board's opinion in *Spinner* is exceptionally thorough and thoughtful, and is consistent with the Board's repeated prior decisions on this issue.

ARGUMENT

I. THE STATUTORY SCHEME

Section 1514A is an unusually multi-faceted anti-retaliation statute, whose complexities reflect the wide range of financial and professional institutions, individuals and practices that are governed by federal securities and anti-fraud law, and the inter-related problems and abuses which the Sarbanes-Oxley Act was enacted to address.

Under section 1514A(a)[5] there are seven categories of actors which are forbidden to engage in retaliation. The statute forbids retaliation by companies whose securities are registered under section 12 of the Securities Exchange Act of 1934. 15 U.S.C. § 78l. Section 12 deals primarily with the registration of companies that are traded on the national stock exchanges; these firms are generally referred to as publicly traded companies. Section 1514A(a) also prohibits retaliation by companies required to file reports under section 15(d) of the Securities Exchange Act. These are firms (primarily mutual funds) that issue securities which may be sold to the public, but that are not publicly traded companies subject to section 12. 15 U.S.C. § 78o(d). For convenience, we refer to these firms subject to section 15(d), but not to

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[5] This summarizes the terms of section 1514A as originally enacted in 2002. In 2010 the language of the provision was amended and the text now lists two additional types of entities. Pub. L. 111-203, Title IX, § 929A, 124 Stat. 1376, 1852 (2010).

section 12, as report-filing companies. The lower courts use the phrase "public company," as do we, to encompass both firms that are publicly traded companies and report-filing companies. Section 1514A also prohibits retaliation against an employee by two other types of firms, "contractor[s]" and "subcontractors" of public companies. In addition, section 1514A forbids an "officer" or "employee" to engage in retaliation; this aspect of the statute imposes personal liability on an individual who engages in retaliation on behalf of a public company. Finally, section 1514A applies to retaliation by an "agent" of a public company; that might refer to a company or to an individual. All of these entities and individuals are forbidden to retaliate against an "employee"; the dispute in this case concerns who is a protected "employee."

To be protected from retaliation, an employee must have engaged in activity related to "conduct which the employee reasonably believes constitutes a violation of" certain specified federal prohibitions.[6] Section 1514A applies to a violation of "any rule or regulation of the Securities and Exchange Commission." Section 1514A also applies to violations of "any provision of Federal law relating to fraud against

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[6] For simplicity we refer below simply to a "violation" of a covered provision. The statute makes clear that a plaintiff asserting a claim under section 1514A need not show that an actual violation occurred, but only that the employee reasonably believed that a violation had occurred or was likely to occur. See *Wiest v. Lynch*, 710 F.3d 121, 133 (3d Cir. 2013).

shareholders," and to violations of four provisions of the criminal code relating to fraud. 18 U.S.C. §§ 1341, 1343, 1344, 1348. Unlike these fraud-related provisions, proof of a violation of SEC rules and regulations does not necessarily require proof of fraud.

Section 1514A covers a number of different types of actions that might be taken by an employee that is related to a covered violation. An employee is protected, for example, if he or she provides information to a federal regulatory agency (such as the SEC), whether by contacting the agency with a tip about a violation, or by responding to questions from an agency official engaged in an investigation. 18 U.S.C. § 1514A(a)(1)(A). The statute also covers employees who provide such information to any Member of Congress or any congressional committee. 18 U.S.C. § 1514A(a)(1)(B). And the law protects employees who attempt to deal with the problem within their own firm by providing information about a violation to "a person with supervisory authority over the employee (or such person working for the employer who has the authority to investigate, discover, or terminate misconduct)." 18 U.S.C. § 1514A(a)(1)(C).[7]

An employee who has been retaliated against in violation of section 1514A must initially file a complaint with the Secretary of Labor. 18 U.S.C. § 1514A(b)(1)(A). The Secretary has delegated his

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[7] Section 1514A applies as well to a number of other types of actions related to a covered violation.

authority to investigate such complaints to OSHA. OSHA also has the authority to make findings and issue an initial order. A party dissatisfied with OSHA's decision may obtain a hearing before an administrative law judge. Decisions by that judge are subject to review by the Administrative Review Board ("ARB"). 29 C.F.R. § 1980.110. Decisions by the ARB are subject to limited judicial review in the courts of appeals. A claimant is not required, however, to pursue an administrative complaint to a final adjudication. If the ARB has not issued a final decision 180 days after the filing of an administrative complaint, a claimant may file suit in federal district court, which will decide such a claim de novo. 18 U.S.C. § 1514A(b)(1)(B). Sections 1514A(b) and 1514A(c) establish a number of procedures and remedies, applicable to both administrative and judicial proceedings. In addition, several provisions of section 1514A incorporate by reference rules and procedures in 49 U.S.C. § 42121(b).

II. THE TEXT OF SECTION 1514A PROTECTS EMPLOYEES OF CONTRACTORS FROM RETALIATION BY THEIR EMPLOYER

The interpretation of section 1514A necessarily begins with the text of the statute itself. In this instance that text makes clear that employees of

contractors[8] of public companies are protected from retaliation by their own employers.

A. A Statute Governing How A Company Treats An "Employee" Applies To That Employer's Treatment Of Its Own Employees

(1) When a statute imposes duties or restrictions on a company regarding the treatment of an "employee," the law ordinarily is referring to the company's own employee, not instead[9] to the employee of some other firm.[10] The word "employee" refers to

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[8] The same standard governs employees of contractors and employees of subcontractors. For simplicity we refer simply to contractors.

[9] This case does not require the Court to decide whether section 1514A, in addition to forbidding covered contractors to retaliate against their own employees, also prohibits those contractors from retaliating against employees of other covered companies. Nor is there an issue in this case as to whether section 1514A covers former employees or prospective employees. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 342-49 (former employees), 343 n.3 (prospective employees) (1997).

[10] When a statute forbids an official who works for an entity to take certain actions against an "employee," the normal meaning of such a provision is that the official may not take the prohibited action against an employee of the entity for which the official works. That type of prohibition retains the same meaning when combined in a single sentence with a prohibition governing conduct by the entity itself. For example, section 948a of Title 33 forbids "any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee" engaged in certain protected activity. The employee against whom an

(Continued on following page)

a worker in a relationship to the particular firm (or sometimes the individual) by which he or she is employed.[11]

"Employee" is similar to other terms that refer to a relationship, such as "sister," "father," "husband," "wife," "friend," or "neighbor."[12] If a new homeowner is advised to "be nice to neighbors," the advice obviously is about the homeowner's own neighbors, not to those of someone else. When Mark Antony invited "friends" and "countrymen" to lend him their ears, he meant his own friends (not those of Brutus and Casca) and listeners whose country was his own (not Cleopatra's Egypt). If reminded that "friends don't let friends drive drunk," no one would ask, "This applies to me, since I am a friend to some people; but *whose* friends should I prevent from driving?" Political candidates who promise not to do favors for relatives are understood to mean favors for their own relatives. Similarly, statutes that address the manner in which a company is to treat an "employee" regulate how the firm deals with its own employees.

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individual agent may not retaliate is someone who works for the agent's employer.

[11] See *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 322 (1992) (employee refers to a "master-servant relationship"). The issue in *Darden* was whether the plaintiff was an employee at all. In the instant case there is no dispute that Lawson and Zang were employees of Fidelity Investments.

[12] Similarly, when Congress enacts a statute regarding how a labor union is to treat a "member," that refers to the union's own members.

For example, section 215(a)(3) of the Fair Labor Standards Act forbids "any person ... to discharge or in any other manner discriminate against any employee because such employee has filed any complaint." 29 U.S.C. § 215(a)(3).[13] The employee against whom a covered "person" may not retaliate assuredly includes the person's own employees. In *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S.Ct. 1325 (2011), the Court repeatedly assumed that a covered person could not retaliate against its own employees.[14] Among the lower courts there is some disagreement as to whether this prohibition is broad enough to forbid covered persons from retaliating against employees of other firms; but no court to our knowledge has held or suggested that section 215(a)(3) fails to protect that person's own employees.

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[13] Congress has enacted a number of statutes forbidding any "person" from retaliating against an "employee." See 29 U.S.C. § 660(c)(1) (OSHA); 30 U.S.C. § 1293(a) (surface mining); 33 U.S.C. § 1367(a) (water pollution); 42 U.S.C. §§ 6971(a) (solid waste disposal), 9610 (hazardous substances); 46 U.S.C. § 80507(a) (safe containers); 49 U.S.C. § 31105(a) (commercial motor vehicle safety).

[14] 131 S.Ct. at 1329 ("The Act contains an antiretaliation provision that forbids employers 'to discharge or in any other manner discriminate against any employee because such employee has filed any complaint' ") (quoting 29 U.S.C. § 215(a)(3) (emphasis added)), 1334 ("the employer must have fair notice that an employee is making a complaint that could subject the employer to a later claim of retaliation"; "the statutes prohibits employers from discriminating against an employee"), 1338 n.3 (Scalia, J., dissenting) ("when the employer takes its retaliatory action").

In one portion of its opinion the court of appeals recognized this common meaning of "employee." Section 1514A forbids retaliation against an "employee" by either a publicly traded company or a report-filing company. With regard to those two types of entities, the court below correctly thought it obvious that in this case "employee" meant an employee of the covered firm. It did not ask, for example, whether this aspect of section 1514A meant that a publicly traded company was only forbidden to retaliate against employees of a report-filing company, and was free to retaliate against its own employees. Similarly, the court of appeals concluded that section 1514A imposed no obligations on any Fidelity funds *because* those funds have no employees of their own. (Pet.App. 27a). That conclusion necessarily assumed that section 1514A, insofar as it forbids a Fidelity fund to retaliate against an "employee," meant – indeed, on the lower court's view meant only – an employee of the Fidelity fund itself.

If section 1514A forbade Fidelity Investments by name from retaliating against an "employee," there would be no doubt that the statute applied to and protected Fidelity Investments' own employees. Similarly, if section 1514A simply prohibited retaliation against an "employee" by any mutual fund adviser, it assuredly would cover Fidelity Investments' employees.

(2) The meaning of such a prohibition of retaliation against an "employee" is not narrowed by the inclusion in a single statute of prohibitions against

retaliation by two or more different types of entities. Certainly a prohibition of retaliation against an "employee" continues to refer to a covered entity's own employees even when a separate prohibition regarding a different entity is set out in another subsection of the same provision. See 12 U.S.C. §§ 1790b(a)(1) (forbidding retaliation against an employee by an insured credit union), 1790b(a)(2) (forbidding retaliation against an employee by the National Credit Union Administration).

"Employee" also refers to the employee of a covered entity when several categories of entities are included in the same sentence. For example, section 4018 of Title 20 provides that "[n]o State or local education agency ... may discharge any employee or otherwise discriminate against any employee" because he or she engaged in certain protected activity. This provision assuredly forbids a state agency from retaliating against its own employees and prohibits a local agency from retaliating against its employees. No one would seriously suggest that section 4018 allows a state agency to retaliate against its own employees, and only forbids a state agency from engaging in reprisals against employees of a local agency.

There are a number of other federal statutes that include several types of covered entities in a single

sentence.[15] For example, the whistleblower protection section of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121, provides that "[n]o air carrier or contractor or subcontractor of an air carrier may discharge an employee" for engaging in certain protected activity. 49 U.S.C. § 42121(a). The court below acknowledged that AIR 21 does forbid the covered contractors and subcontractors from retaliating against their own employees. (Pet.App. 30a-31a). Section 1514A was to a substantial degree modeled after AIR 21, and incorporates by reference subsection (b) of AIR 21. 18 U.S.C. § 1514A(b)(2).

If each of the four types of entities covered by section 1514A was subject to a distinct, but identically worded, prohibition in separate parts of the provision – with a separate subsection each for publicly traded companies, report-filing companies, contractors

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[15] E.g., 12 U.S.C. §§ 1831j(a)(2) (forbidding retaliation against an "employee" by a "Federal banking agency, Federal home loan bank board, Federal reserve bank, or any person who is performing ... any function or service on behalf of the [Federal Deposit Insurance] Corporation"), 5567 (forbidding retaliation against an "employee" by a "covered person or service provider"); 15 U.S.C. § 2087 (forbidding retaliation against an "employee" by a "manufacturer, private labeler, distributor or retailer"); 20 U.S.C. § 3608 (forbidding retaliation against an "employee" by a "State or local educational agency"); 31 U.S.C. § 5328(a) (forbidding retaliation against an "employee" by a "financial institution or nonfinancial trade or business"); 49 U.S.C. § 30171 (forbidding retaliation against an employee by a "motor vehicle manufacturer, part supplier, or dealership").

of such companies, and subcontractors of such companies – there would be no question the term "employee" against whom a contractor may not retaliate meant at the least its own employees. The meaning of that prohibition is not narrowed[16] merely because in section 1514A, as in a number of other statutes, Congress accomplished the same thing by including several different types of covered entities in a single sentence, rather than covering them separately in different subsections.

B. A Statute That Forbids A Company To "Discriminate Against An Employee In The Terms and Conditions of Employment" Prohibits Discrimination In The Terms and Conditions of Employment At That Company

Any uncertainty as to the identity of the "employees" against whom a contractor is forbidden to retaliate is resolved by the portion of section 1514A delineating the *types* of retaliatory measures which a contractor is taking. Section 1514A(a) provides that a contractor may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment." The specific retaliatory acts listed

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[16] The Court need not decide whether including these prohibitions in a single sentence had the effect of broadening their scope by forbidding one covered entity from retaliating against an employee of another covered entity.

are the types of actions that (except in highly unusual circumstances) a contractor would take against its own employees, not against individuals who work for third parties. The only "terms and conditions of employment" which a contractor normally controls are the terms and conditions of employment at that contractor itself. "[R]arely would a contractor or especially a subcontractor be able to adversely affect the terms and conditions of an individual's employment with a publicly traded company." *Spinner v. David Landau and Associates, LLC,* Pet.App. 150a.[17]

When Congress forbade a contractor to "discharge" an employee, it surely had in mind the dismissal by the contractor of its own employees. Even assuming that there is some imaginable circumstance in which a contractor could fire someone else's worker, without question in the overwhelming majority of cases the people fired by any company are its own workers. Few (if any) managers and personnel officials have ever dismissed someone who was employed by another company; since the onset of the 2007

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[17] See Pet.App. 175a ("Because [contractors and subcontractors] have no authority over the 'terms and conditions' of a public company's employee's employment, an interpretation of Section [1514A] that identifies nonpublic entities such as contractors and subcontractors as entities prohibited from retaliating only against employees of public companies renders their inclusion surplusage") (concurring opinion), 101a-102a ("It is difficult to think of circumstances that would ... enable a subcontractor to discharge, demote, or suspend the employee of a public company, an entity with presumably no direct relationship to the very subcontractor executing the discharge.").

financial crisis, millions of workers have been fired or laid off, almost invariably by their own employers. When a company dismisses an employee, that necessarily involves a use of the company's own authority. The decision, of course, would be made by an individual, an officer, employee, or agent of the company where the fired worker was employed. But a contractor which was not empowered to act as an agent of some other company could not dismiss one of that other company's employees. "[A]n actual termination ... is *always* effected through an official act of the [employing] company." *Pennsylvania State Police v. Suders*, 542 U.S. 129, 148 (2004) (emphasis in original).

The first three types of retaliation listed in section 1514A – "discharge, demot[ion] [and] suspen[sion]" – are classic examples of what this Court in other contexts has described as tangible employment actions. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761-63 (1998).[18] These are actions which a contractor (unless it was also an agent of some other firm) could only take against its own employees. "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a

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[18] Section 42121(b) of Title 49, which is incorporated by reference into section 1514A(b), repeatedly described the prohibited retaliatory methods as "unfavorable personnel action[s]." 49 U.S.C. §§ 42121(b)(2)(B)(i)-(iv).

decision causing a significant change in benefits." 524 U.S. at 761. "When [someone] makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation." *Id.* at 761-62. "Tangible employment actions are the means by which [someone] brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act." *Id.* at 762. "As a general proposition, only ... a person acting with the authority of the company, can cause this sort of injury." *Id.* A contractor could take such a tangible employment action against its own employees, but not do so against the employees of some other firm – unless the contractor were *also* an agent of that firm.

The retaliation forbidden by section 1514A is not limited to tangible employment actions; the statute more broadly forbids any "discriminat[ion] ... in the terms and conditions of employment." But this broader prohibition also refers (save in exceptional circumstances) to actions taken by the employer against its own employees. One company does not ordinarily control the terms and conditions of employment of a worker employed by someone else.[19] A contractor could, for example, call someone else's

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[19] As we note below, sometimes an employee of a contractor actually works at the office or plant of the public company. In that circumstance the public company would control some of the terms and conditions of the employee's employment.

employee at work and threaten to burn down his house if he or she revealed a violation of the securities laws. But such a threat, without some complicity or acquiescence on the part of the victim's own employer, would not constitute discrimination in the terms or conditions of employment.

Fidelity Investments asserts that "it is not difficult to think of situations where a subcontractor could retaliate against the employee of a public company." (R.Suppl.Br. 5 n.1). This misapprehends in two important respects the relevant issue. First, the controlling question is what situations Congress had in mind when it prohibited a contractor from retaliating against an employee through the measures set out in section 1514A; if, as we urge, a contractor could and would *usually* direct such retaliatory measures against its own employees, it is fair to assume that those employees are protected by the law. It does not matter whether it would be possible to hypothesize some highly atypical circumstance in which a contractor could retaliate against someone else's employee. Such retaliation against the employee of another firm might fall within the scope of section 1514A, but not to the exclusion of the far more common practice of retaliating against one's own employees. Second, the focus of this inquiry must be types of retaliation that are covered by section 1514A itself: discrimination in the terms and conditions of employment. The possibility of retaliation outside the terms and conditions of employment – such as slashing the tires of a whistleblower's car – is irrelevant.

The court of appeals suggested that

> "[t]he idea behind" the provision listing contractors, subcontractors, and agents in § 1514A(a) as entities *by* whom retaliation cannot take place "is that a covered firm, such as IBM, can't retaliate against whistleblowers by contracting with an ax-wielding specialist (such as the character George Clooney played in 'Up in the Air')."

670 F.3d at 69 n.11 (Pet.App. 19a, n.11) (Emphasis in original). This makes no sense for several reasons. First, if Clooney's character were authorized to select the workers to be laid off, and chose them because they had engaged in protected activity, the axe-wielding specialist would be personally liable under the provision of section 1514A forbidding retaliation by an "agent" of a public company. And the public company would be liable for the acts of its authorized agent. This variant of the "Up in the Air" hypothetical cannot account for the decision of Congress to forbid contractors and subcontractors, in addition to agents of public companies, to retaliate against employees.[20] Second, if a public company's own officials decided to fire a whistleblower because of the employee's protected activity, the company would be liable regardless of how or through whom it implemented or announced the decisions. Section 1514A flatly forbids

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[20] "§ [1514A] specifically lists agents as covered entities, just like contractors. The word 'contractor,' therefore, must be doing something else." Pet.App. 56a (dissenting opinion).

a public company to discharge a worker for unlawful reasons; the "entit[y] *by* whom the retaliation ... take[s] place" is irrelevant. In this circumstance, including contractors would add nothing to the protection already provided by coverage of the public company. Third, in the movie Mr. Clooney's character does not select the workers to be laid off, he merely delivers the bad news; he may wield the axe, but he does not select the victims. In those circumstances, including contractors, subcontractors and agents would have no effect whatsoever; Clooney's character would not act with the intent forbidden by section 1514A, and he would no more face liability than the telephone carrier that transmitted to the whistleblower a text message announcing the dismissal.

The First Circuit attempted to explain the wording of section 1514A in yet another way. "Section 1514A(a)'s list of company representatives serves ... to ensure an employee of a public company is covered under the provision if he or she were harassed by officers, other employees, contractors or subcontractors to the public company for reporting fraud in that public company." (Pet.App. 18a). But section 1514A does not apply to all harassment, but only harassment that involves discrimination in "the terms and conditions of employment." Absent some sort of involvement or acquiescence on the part of the employer, third party harassment of an employee by a contractor or anyone else would not usually constitute discrimination in "the terms and conditions of employment." Workers are sometimes harassed on

the job by an ex-boyfriend or ex-husband, who follows them to their workplace as part of a pattern of abuse. Although that type of harassment is intolerable, and in some circumstances a criminal offense, it does not (absent some involvement or negligence on the part of the employer) constitute employment discrimination.

It is difficult to believe that Congress applied section 1514A to contractors and subcontractors solely to deal with the highly implausible possibility that an employee of a contractor would harass a worker of a public company. In the context of that contractual relationship, the contractor or subcontractor is dependent on the business and payments it receives from the public company. Arthur Andersen was receiving millions in fees from Enron, and Enron officials were in a position to take their lucrative accounting business elsewhere. No outside accountant in full possession of his faculties would harass one of his client's employees; such a bizarre course of action (unless connived in by the client itself) would assuredly lead either to the dismissal of the harasser or the termination of the accounting firm's business with that client. The reality of this financial relationship is that individuals who work for contractors may hold their jobs, to some degree, at the pleasure of officials of the public company, not vice versa.[21] Even

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[21] The actual dynamic of the relationship between public companies and their contractors was depicted in a New York Times story based on documents obtained by the Senate Permanent Subcommittee on Investigations.

(Continued on following page)

if there were some plausible circumstance in which a contractor might harass an employee of a public

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> In the summer of 1998, when it was eager to win more investment banking business from Enron, Merrill Lynch replaced a research analyst who had angered Enron executives by rating the company's stock "neutral" with an analyst who soon upgraded the rating, according to Congressional investigators.
>
> The move by Merrill Lynch came after two Merrill executives wrote a memo that April to the firm's president, Herbert Allison, saying that Merrill had lost a lucrative stock underwriting deal because Enron executives had a "visceral" dislike of the research analyst, John Olson, and what he told investors about Enron stock, according to documents obtained by investigators for a Senate panel looking into the relationship among Enron and its banks. ...
>
> In the memo, the two investment bankers, Rick Goron and Schuyler Tilney, noted that "our research relationship with Enron has been strained for a long period of time." Mr. Olson, they said, "has not been a real supporter of the company.... "..... They also pointed out that all of the investment banks that had won a portion of the underwriting deal from Enron had "buy" ratings on Enron stock.
>
> In early 1999, after the new analyst took over, Mr. Tilney wrote to Mr. Allison to say that Enron's anger with Merrill's research had "dissipated" and that "to that end," Merrill had since won Enron business that would generate at least $45 million in fees....
>
> Last week, Merrill placed Mr. Tilney, now head of the firm's energy investment-banking practice, on paid administrative leave for refusing to testify to the Senate panel on Tuesday about the company's dealings with Enron.

Richard A. Oppel, Jr., "Merrill Replaced Research Analyst Who Upset Enron," New York Times, July 30, 2002.

company, and do so in a way that violated section 1514A, this surely cannot be the reason why Congress applied section 1514A to contractors; it offers no explanation of the statutory language forbidding contractors from firing, demoting, or suspending an employee for having engaged in protected activity.

Fidelity Investments offers yet a different explanation of the decision of Congress to include contractors and subcontractors in section 1514A. "A subcontractor could easily retaliate against an employee of a public company if there is a close relationship between the public company and the service provider, such as between an issuer of securities and its auditor." (R.Suppl.Br. 5 n.1.) It is unclear what scenario Fidelity Investments has in mind. Perhaps it is suggesting that a contractor might persuade a public company to fire a whistleblower, arguing that such retaliation would deter other possible whistleblowers. In that situation, however, the public company itself would be liable, and there would be no reason to cover contractors.

In sum, ordinarily the only employee whose terms and conditions of employment a contractor could alter would be the contractor's own employee; Congress could not have applied section 1514A to contractors and subcontractors simply to prohibit them from engaging in a type of retaliatory practice which would at least usually be entirely impracticable. The hypothetical explanations of the meaning and purpose of covering contractors and subcontractors are either implausible, duplicative of the prohibition

against retaliation by agents, or not violations of section 1514A at all.

The First Circuit's narrow interpretation of section 1514A has the perverse consequence of permitting the type of third party retaliation that is far more likely. Because on that court's view an employee of a contractor is not an "employee" protected by the statute, a public company would be free to retaliate against employees of its contractors. The risk of that type of retaliation is significant. Because the contractor itself is dependent on the public company's business, the public company may be able to dictate what the contractor will do, or tolerate, in order to maintain what may be a highly lucrative financial relationship. A contractor's employees sometimes work in the office or plant of the public company; accountants frequently do so when auditing a firm's books. In that situation the public company has substantial control of the conditions of the employee's employment. In some cases the working relationship between the public company and the contractor is so close that the public company directly controls the contractor's personnel decisions.[24]

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[24] See *Evans v. Miami Valley Hospital*, 2009 WL 1898238 at *6 (ARB June 30, 2009) (air carrier "exercised significant control over and directly influenced the terms and conditions of [contractor's employee's] employment").

C. Numerous Provisions of Section 1514A Support The Conclusion That The Statute Protects Employees of Contractors

A number of other provisions of section 1514A, and of the incorporated provisions of section 42121(b), make clear that contractors may not retaliate against their own employees.

The term "employee" appears twice in the first sentence of section 1514A(a). As discussed above, section 1514A(a) provides that "employees" are the individuals against whom retaliatory action may not be taken. The First Circuit insisted that this use of the term "employee" means "an employee *of such public company.*" (Pet.App. 15a) (Emphasis in original).[23] But section 1514A also uses the term "employee" a second time, in the same sentence, to delineate those who are forbidden to engage in retaliation: a publicly traded company, a report-filing company, or an "officer, employee, contractor, subcontractor, or agent

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[23] See Pet.App. 15a-16a ("the protected employee refers only to employees of public companies"; "only the employees of the defined public companies are covered"), 20a ("the use of the term 'employees' ... refers to 'employees of publicly traded companies'"), 21a ("the 'generic reference' to employee in the text 'should be read as a reference to' the 'employees of publicly traded companies'"), 25a ("Congress did not intended coverage to reach beyond employees of public companies"), 28a ("Congress's choice to limit whistleblower protection ... to the employee of ... 'publicly traded companies'"), 31a n.15 ("the text of § 1514A(a) is unambiguous in limiting whistleblower protection to employees of public companies").

of such company." (Emphasis added). The statute expressly imposes the limitation "of such company" on the "employee[s]" forbidden to engage in retaliation, and then omits any such limitation in providing that "employee[s]" are protected from retaliation. Only 22 words separate these two usages of "employee" – one expressly limited by the phrase "of such company," and one not – in the very same sentence. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Dean v. United States*, 556 U.S. 568, 573 (2009) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotations omitted)). That presumption applies with particular force when the inclusion and omission of limiting language occur in the very same sentence. The court below highlighted this problem when it observed that "Congress could have more clearly enacted defendants' interpretation of § 1514A by extending the provision's coverage only to 'an employee *of such company*.'" (Pet.App. 16a, n.9) (Emphasis in original). But that emphasized language is precisely the limitation that Congress clearly chose to not enact in section 1514A when it specified the individuals – "employees" – protected from retaliation.

Section 1514A(a)(2) delineates one of the types of activities protected from retaliation; it provides in part that an employee may not be retaliated against

for an act done by that employee "to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed, or about to be filed (*with any knowledge of the employer*) relating to an alleged violation [of certain provisions]." (Emphasis added). Under the First Circuit's view, because only employees of public companies are protected, this provision requires that the public company have knowledge of the impending filing even where the entity engaging in retaliation is a contractor or subcontractor. But that makes no sense. Thus, if a contractor well aware of an imminent filing retaliates against an employee of a public company, that retaliation is lawful so long as the public company itself does not know that a proceeding is about to be commenced. Surely Congress did not intend to permit the contractor to retaliate under those circumstances. Conversely, if the public company does know that a proceeding is about to be filed, but the contractor does not, the "with any knowledge" requirement is satisfied; but it is difficult to understand how a contractor could be said to have retaliated against an employee "because" he assisted a proceeding "about to be filed" if the contractor itself did not know that there was any such impending proceeding. The "with any knowledge" requirement, on the other hand, makes perfect sense if the "employee" against whom a contractor may not retaliate is its own employee.

Section 1514A(b)(2)(A) provides that an action to enforce section 1514A "shall be governed under the rules and procedures set forth in section 42121(b) of

Title 49." Those rules and procedures clearly contemplate that in an enforcement proceeding the claim will concern an action taken by the complainant's own employer, and that the respondent in the proceeding will be that employer. But the only sort of contractor retaliation actionable under the First Circuit standard – retaliation by a contractor against the employee of a public company – simply does not fit the provisions of section 42121(b). Section 42121(b)(2)(B)(ii) provides that the Secretary may not conduct an investigation of a complaint of unlawful retaliation "if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of th[e] [protected] behavior." Under section 42121(b)(2)(B)(iv) relief may not be ordered "if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior." These provisions would make no sense if the retaliatory action was taken by a contractor, not against its own employee, but instead against an employee of a public company. In that circumstance the employer (the public company) might never have "taken [an] unfavorable personnel action" at all; there would, for example, be no such adverse employer action if – as the First Circuit hypothesized – the retaliation took the form of harassment by the contractor. If a claimant who was (or had been) an employee of a public company sought monetary relief from a retaliating contractor, the claimant's own employer would have no stake in the outcome of that

dispute, and thus would have no reason to try to "demonstrate[ ] [anything] by clear and convincing evidence." If an employee of a public company sued a contractor for retaliatory harassment, there would be no reason even to name the employer as a party at all. On the other hand, these provisions make perfect sense if the adverse action at issue is retaliation by a contractor against its own employee.

Sections 1514A and 42121(b) expressly provide that the remedy for an unlawfully discharged employee will include reinstatement. Section 1514A(c)(2)(A) requires (in the case of an unlawful discharge or demotion) "reinstatement with the same seniority status that the employee would have had, but for the discrimination." Section 42121(b)(3)(B) directs that "the Secretary shall order the person who committed [a proven violation] to ... (ii) reinstate the complainant to his or her former position, ... and restore the terms, conditions, and privileges associated with his or her employment." Neither of these provisions would make any sense as applied to a contractor that retaliated against the employee of a public company. As explained above, it is difficult to imagine a common scenario in which a contractor could discharge or demote the employee of some other firm. Even in a hypothetical case in which a contractor somehow did that, the contractor itself ordinarily would be in no position to reinstate its victim, to provide the victim with the proper seniority status, or to restore all his or her pervious terms, conditions and privileges. Section 42121(b)(6)(A) authorizes a retaliation victim

to file suit "against the person to whom [an] order was issued [by the secretary] to require compliance with such order"; but a contractor to whom a reinstatement order was issued would have no ability to comply with such an order.

Consider, for example, the First Circuit's hypothetical from Up In The Air; assume (implausibly) that a public company gave to Mr. Clooney's character, a complete outsider, authority to decide whom to fire, and further assume that his character (without any prompting from the public company) decided to go on a personal vendetta against employees who had disclosed violations of the securities law to the SEC. An order from the Secretary, or a court, that Clooney's character reinstate his victims would be pointless. Mr. Clooney's character left town within hours of announcing the dismissals, and evidently had no further relationship with the firms that briefly retained him or his firm. He was only an axe-wielding specialist, and simply had no power to restore his victims to their previous positions. Similarly, in the hypothetical proposed by Fidelity Investments, if a public company's auditor somehow brought about the discharge of a company employee in a manner that violated section 1514A, the auditor would have no way of obeying an order to "reinstate" that worker.

Section 1514A(a)(2) identifies certain individuals to whom an employee with the protection of section 1514A may report actual or apparent violations. Anti-retaliation protection covers an employee when he or she reports such matters to any "person working for

the employer who has the authority to investigate, discover, or terminate misconduct." That language makes clear that a key purpose of section 1514A is to assure that company officials who do have the "authority to investigate, discover, or terminate misconduct" will have access to information from, or the assistance of, other employees. Officials of outside accountants and law firms, and of mutual fund advisers, have just such authority. A central reason that public companies retain outside accountants and attorneys is to assure that any possible misconduct at the company will be discovered and investigated. Identifying potential misconduct is precisely what auditors do when they check the books of a company, usually following up apparent discrepancies with further investigation. In light of this language in section 1415A(a)(2), it makes no sense to interpret section 1514A to exclude the very outside accountants and lawyers retained for the specific purpose of unearthing misconduct. Similarly, officials of mutual fund advisers are precisely the individuals in a position to terminate misconduct in the manner in which the adviser is operating a fund and or in the drafting of documents to be filed with the SEC and relied on by the public. The Fidelity Investments officials to whom Lawson and Zang complained, presented information about improprieties in the manner in which Fidelity Investments was acting, clearly had the authority to correct that misconduct. Limiting the employees protected by section 1514A to individuals who work for public companies is particularly inconsistent with the specific focus of section 1514A(a)(2),

because often *only* officials of outside contractors will have the independence to be willing even to look into the types of violations with which section 1514A is concerned.

The statutory language delineating the types of violations which a whistleblower may report provides further support for the conclusion that the protected whistleblowers include employees of contractors. Section 1514A protects whistleblowing about violations of SEC rules and regulations. Many of those SEC provisions govern, not public companies, but contractors of such companies. A series of regulations establish standards and requirements for accountants. 17 C.F.R. § 210.2-01 to -07. Part 205 of the SEC regulations govern attorneys who practice before the Commission, which would typically include securities lawyers at an outside law firm. Part 270 of those regulations govern mutual fund advisers, such as Fidelity Investments. There is no dispute that information about violations of these provisions is within the scope of section 1514A. But as a practical matter, often the only employees who would have information about violations of these particular SEC regulations would be employees of contractors, not employees of public companies. Only an employee of an accounting firm would usually know if the firm was failing to retain written audit records, as required by section 210.2-06(a). And where, as is common, a mutual fund itself has no employees at all, only the employees of the contractor mutual fund adviser would know if the adviser were in violation of SEC regulations.

In the instant case, although the Fidelity funds (the public company) and Fidelity Investments (the contractor) are subject to a wide range of important SEC regulations, only employees of Fidelity Investments, not employees of the Fidelity funds, would know if those regulations are being violated, because the funds have no employees. Section 1514A could only provide meaningful protection to the disclosure "of violations of regulations governing accountants, outside counsel, and mutual fund advisers if section 1514A protects employees of contractors (such as accounting firms, outside counsel, and mutual fund advisers), because ordinarily only employees of those contractors would have knowledge of that information.

Finally, because section 1514A clearly applies to the mutual fund industry, it would make no sense to construe "employee" in a manner would mean that in many instances, as in the instant case, no one would actually be protected from retaliation. A mutual fund itself is clearly covered by section 1514A(a); it is a "company ... required to file reports under section 15(d) of the Securities Exchange Act of 1936."[24] A mutual fund's adviser is also subject to section 1514A, because it is a "contractor ... of such company." Information about a violation by the fund or its adviser of "any rule or regulation of the Securities and

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[24] Section 405 of SOX, 15 U.S.C. § 7263, expressly excludes investment companies from certain disclosure requirements. No such exclusion limits the scope of section 1514A.

Exchange Commission" would fall within the scope of section 1514A(a)(1). Those provisions reflected a decision by Congress that section 1514A should safeguard investors who purchase mutual fund shares as well as investors who purchase shares of publicly traded companies. Mutual funds hold more than $14 trillion in investor assets.[25] The First Circuit acknowledged that under its construction of section 1514A that provision usually would not protect anyone connected to a mutual fund. That interpretation is inconsistent with the terms of section 1514A, which unquestionably do apply to any fund, to any fund adviser, and to any misconduct on their part violating the statutes, rules or regulations listed in section 1514A(a)(1).

III. THE THREE HEADINGS IN SECTION 806 OF SARBANES-OXLEY DO NOT SUPPORT A NARROWER READING OF SECTION 1514A

The First Circuit's interpretation of section 1514A rests heavily on two of the three headings that appear in section 806 of SOX. The plain meaning of the text of section 1514A, however, cannot be overcome by reliance on the short headings, whatever interpretation the headings might suggest. In this case those headings are too inconsistent, and too

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[25] See http://www.ici.org/pdf/2013_factbook.pdf, visited July 28, 2013.

abbreviated, to throw any light at all on the meaning of the text of section 1514A.

There are three relevant headings in this case. The heading of section 1514A reads: "Civil action to protect against retaliation in fraud cases." That is also the section title that the Sarbanes-Oxley Act adds to the table of sections at the beginning of chapter 73 of Title 18. Pub. L. 107-209, § 806(b), 116 Stat. 802 (2002). Subsection (a) of section 1514A is headed "Whistleblower protection for employees of publicly traded companies." Section 806 of the Sarbanes-Oxley Act, which contains what is now section 1514A as well as a related technical provision, is headed "Protection for employees of publicly traded companies who provide evidence of fraud."

These headings differ from one another in several ways. While the subsection (a) heading and the section 806 heading refer to "employees of publicly traded companies," the section 1514A heading does not. The section 1514A heading and the section 806 heading, but not the subsection (a) heading, refer to fraud. The section 806 heading alone refers to those who "provide evidence of fraud," only the subsection (a) heading refers to "whistleblower[s]," and the section 1514A heading unlike the others refers broadly to "fraud cases." The court of appeals insisted that this crazy-quilt pattern made the meaning of section 1514A crystal clear. (Pet.App. 19a-22a).

The court below believed that the reference in the section 806 heading and the subsection (a) heading to "employees of publicly traded companies" demonstrated that section 1514A does not apply to

employees of contractors and subcontractors. But the third caption – the section 1514A heading – , unlike the other two headings, includes no reference to any particular type of employee; it refers more broadly to banning retaliation in fraud cases, and does not mention any particular type of employees. The court of appeals simply dismissed the section 1514A heading as irrelevant, remarking only that "[i]t is unlikely Congress intended the [section heading] to be broader than the terms of the 'Protection' discussed in the title of section 806." (Pet.App. 19a). But the wording of the section 1514A heading obviously *is* broader than the section 806 heading; the section 1514A heading is not about any particular types of employees and, unlike section 806, it refers broadly to "retaliation in fraud cases," not only to cases where an employee "provides evidence." The courts may not simply disregard the broader language in the section 1514A heading on the ground that Congress likely did not intend to use it, as if the wording of the section 1514A heading was just a drafting error. Whether Congress intended section 1514A to extend beyond employees of public companies is the very issue in this case; to dismiss the more broadly worded section heading on the ground that such an intent is "unlikely" is to assume the answer and then infer from the answer which heading "likely" reveals what Congress really meant. The court of appeals also thought it significant that the section 806 heading's reference to "employees of publicly traded companies" is "repeated" in the subsection (a) heading, thus evincing a "double limitation." (Pet.App. 20a). But the inconsistencies among these headings surely cannot be

resolved based on majority rule; in any event, the broader section 1514A heading language is also repeated in the subsection (b) of section 806.

Where a given statute has two or more headings, a court is not free simply to rely on whichever heading or headings support its preferred interpretation of the law, and ignore the other. The First Circuit's treatment of the headings in this case is in marked contrast to its utilization of the headings in AIR 21, on which section 1514A was modeled. 49 U.S.C. § 42121. The section heading of section 42121, like the section heading of § 1514A is broad. In explaining why AIR 21 does cover contractor employees, the court of appeals pointed out that "[t]he pertinent section of AIR 21 is entitled: "Protection of employees providing air safety information." (Pet.App. 29a). The court below then chose to simply ignore the heading of subsection 42121(a), which in language similar to the heading of subsection 1514A(a) reads "Discrimination against airline employees." The heading of subsection 42121(a), like the heading of subsection 1514A(a), does not also mention contractors and subcontractors covered by the statute. It is impossible to understand why the First Circuit concluded that the omission was irrelevant to the interpretation of section 42121, and yet critical to the meaning of section 1514A.

Moreover, there is no dispute that both the section 806 heading and the subsection (a) heading make no mention of certain employees and activities that indisputably *are* protected under section 1514A.

Both headings refer only to employees of publicly traded companies, firms that are listed on one of the stock exchanges. Neither heading mentions employees of report-filing companies (such as mutual funds) required to file reports under 15 U.S.C. § 78o(d); but section 1514A undeniably covers employees of those omitted firms. The body of section 1514A(a) lists four types of covered entities: publicly traded companies, report-filing companies, contractors of either, and subcontractors of either.[26] The section 806 and subsection 1514A(a) headings refer only to employees of the first category of four listed entities. The First Circuit insists that the headings demonstrate that section 1514A applies to employees of publicly traded companies (who are mentioned) and to employees of report-filing companies (who are not), but excludes employees of the other two types of entities because they are not mentioned, even though in that regard they are no different than employees of report-filing companies. But the court of appeals offers no real explanation of this distinction among the non-mentioned categories of employees.

The court of appeals candidly acknowledged that the section 806 and subsection headings are only "shorthand," at least insofar as the use of "the term 'publicly traded companies' is a shorthand for" both publicly traded companies and report-filing companies. (Pet.App. 21a). The lower court insisted,

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[26] An agent of a public company might also be a firm with employees of its own.

however, that "publicly traded companies" could not also be shorthand for the other covered entities. Coverage of employees of contractors and subcontractors, the court maintained, "is contradicted by the plain words of the title of section 806 and the caption of § 1514A(a)." (Pet.App. 22a). But that simply is not true. The "plain words" of those headings do not state that the protected employees mentioned are the *only* protected workers under the statute; clearly they are not, because the statute also protects people not mentioned in those two headings, employees of report-filing companies. Interpreting the section 806 heading and the subsection (a) heading as shorthand for employees of all of the covered entities would not, as the First Circuit objected, mean that those headings "do not mean what they say." (Pet.App. 21a). Those headings simply do not "say" that the employees mentioned are the only protected workers, and they do not "say" anything at all about employees who work for report-filing companies. The First Circuit insisted the section 806 heading and the subsection heading "are not ambiguous." (Pet.App. 22a). But those provisions do not state – even unambiguously or otherwise – that the employees referred to are the *sole* workers protected by the statute.

In addition, the section 806 heading refers only to employees "who provide evidence of fraud." In this regard as well the section 806 heading is shorthand. Section 1514A also protects employees who engage in other types of activities. It covers employees who provide information to federal officials, or certain company officials, about violations of any SEC rule or

regulation, which do not invariably require proof of fraud. The subsection (a) heading is about "whistleblow[ing]," but an employee could assist an investigation (within the scope of section 1514A(a)(1)) or a proceeding (under section 1514A(a)(2)) in ways that do not involve whistleblowing.[27] These distinctions confirm that Congress could not have intended either heading to be an exhaustive specification of every activity – or every type of employee – protected by the statute.

The First Circuit's analysis illustrates the danger of attempting to interpret a statute based solely (and in this case, selectively) on whether something is not mentioned in a heading.[28] In *Brotherhood of Railroad Trainmen v. Baltimore & O.R.Co.*, 331 U.S. 519 (1947), the parties disagreed about whether the

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[27] An employee might do so, for example, by refusing to shred documents which he or she knew were relevant to a pending SEC investigation.

[28] When this Court has relied on a heading to interpret a statute, those decisions have been based on the words that were actually included in that heading. Thus in *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991), the Court held that the term "employment" in a provision of the Immigration and Nationality Act meant "unauthorized employment," because the more specific phrase "unauthorized employment" was actually used in the heading. 502 U.S. at 189-90. In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Court held that a particular statute merely established the penalty for an existing crime, rather than creating a new offense; in doing so it relied on the fact that the heading of the section in question affirmatively referred to "criminal penalties," rather than to crimes. 523 U.S. at 229.

statutory right accorded to representatives of trainmen to intervene in "any proceeding arising under this Act" included judicial proceedings. The railroad argued that the right was limited to proceedings before the Interstate Commerce Commission, relying on the heading of the provision involved, which read "Commission procedure; delegation of duties; rehearing," and made no mention of judicial procedure or proceedings. 331 U.S. at 527. This Court refused to attach any significance to that omission.

> That the heading ... fails to refer to all the matters which the framers of that section wrote into the text is not an unusual fact. That heading is but a short-hand reference to the general subject matter involved.... [H]eadings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles.

331 U.S. at 528. In the instant case the most sensible reading of the section 806 heading and the subsection (a) heading is that the drafters, in attempting to capture in a few words a provision that applied to

employees of four types of firms, simply chose to refer to the first type of company mentioned in the body of the text.

IV. INTERPRETING SECTION 1514A TO FORBID RETALIATION AGAINST EMPLOYEES OF CONTRACTORS IS NECESSARY TO THE VIABILITY OF OTHER PROVISIONS OF SARBANES-OXLEY

Interpreting section 1514A to protect employees of contractors and subcontractors is essential to the vitality of other important provisions of SOX. SOX creates a number of substantive requirements and enforcement tools intended to prevent a recurrence of the financial collapses of Enron and other firms that led to the adoption of the act. "Congress also recognized that for *any* of these tools to work, the law had to protect whistleblowers from retaliation." *Bechtel v. Competitive Technologies,* 448 F.3d 469, 484-86 (2d Cir. 2006) (Straub, J., dissenting) (emphasis in original).

Section 307 of SOX requires the SEC to issue rules requiring any attorney practicing before the Commission "to report evidence of a material violation of securities law ... to the chief legal counsel or the chief executive officer of the company." 15 U.S.C. § 7245(1). If no appropriate action is taken in response to that report, the attorney must call the possible violation to the attention of certain designated members of the issuer's board of directors. 15

U.S.C. § 7245(2). Evidence of "a material violation of securities law" would almost always be information within the scope of section 1514A(a)(1). Section 307, and the implementing regulations issued in 2003 by the SEC, would often apply to attorneys at a law firm that is the outside counsel for an issuer and to attorneys who work for a mutual fund adviser. 17 C.F.R. part 205. Congress surely did not intend when it enacted SOX[29] that outside counsel who comply with the section 307 regulations would be subject to dismissal for obeying the law. Section 307 could not be fully effective if section 1514A permitted a law firm or mutual fund adviser to fire a lawyer because he or she obeyed the SEC regulations mandated by SOX itself. It would often be equally important to the effectiveness of section 307 and its implementing regulations that an employee of a law firm or of a mutual fund adviser be protected from retaliation for disclosing information about possible violations of securities laws *to* a lawyer at the law firm or fund adviser who was subject to the requirements of section 307. Absent such a protection, a firm or adviser could isolate attorneys from potentially inculpatory information, largely nullifying the section 307 regulations, by punishing any employee who provided such evidence to an attorney subject to the obligations of

---

[29] In 2010, as part of the Dodd-Frank Act, Congress amended the Securities Exchange Act of 1934 to protect whistleblowers from retaliation when they make disclosures required by SOX. Pub. L. 111-203, § 922(a), 124 Stat. 1376, 1841 (2010).

the section 307 regulations. Interpreting section 1514A to apply to all employees of contractors – not just lawyers – addresses that problem. In the instant case, Lawson had complained to Fidelity Investment's General Counsel about violations of SEC rules and regulations, and Zang reported his concerns to another Fidelity Investment's attorney; both lawyers were doubtless subject to the section 307 regulations.

Section 303 of SOX provides:

> It shall be unlawful, in contravention of such rules or regulations as the Commission shall prescribe ... , for any officer or director of an issuer, or any other person acting under the direction thereof, to take any action to fraudulently influence ... or mislead any independent public or certified accountant engaged in the performance of an audit of the financial statements of that issuer for the purpose of rendering such financial statements materially misleading.

15 U.S.C. § 7242. A false or misleading statement made to an accountant would violate the SEC's regulations implementing section 303, and information about such an inaccurate statement would fall within the scope of section 1514A(a)(1). Aside from the perpetrators themselves, however, the only individual likely to recognize the inaccuracy of a false statement to an accountant would be an employee of the accounting firm to which the statement in question was made. Section 303 would be exceedingly difficult to enforce if section 1514A did not protect the

very outside accountants who received and recognized those falsehoods. They could be fired for calling those inaccuracies to the attention of others in the accounting firm or for alerting federal regulators to those falsehoods.

Title I of SOX creates a detailed regulatory scheme for the accounting firms that audit public companies. 15 U.S.C. §§ 7701 *et seq.* It establishes a Public Company Accounting Oversight Board (PCAOB), whose rules must be approved by the SEC. 15 U.S.C. § 7217(b)(2). Section 101(c)(2) requires the PCAOB to adopt rules establishing "auditing, quality control, ethics, independence, and other standards relating to the preparation of audit reports for issuers." 15 U.S.C. § 7211(c)(2). Section 103 specifies in detail the types of auditor regulations that must be adopted. 15 U.S.C. § 7213. The PCAOB rules are treated for all purposes as violations of the rules and regulations issued under the Securities Exchange Act. 15 U.S.C. § 7202(b)(1). Thus a violation of any of the PCAOB rules implementing Title I would fall within the scope of section 1514A(a)(1). Section 802 requires the SEC to issue rules and regulations directing accountants who conduct audits of issuers to retain certain records. 18 U.S.C. § 1520(a)(2). These PCAOB and SEC rules regulate accounting firms, not publicly traded or report-filing companies. If section 1514A did not apply to employees of contractors and subcontractors, and therefore does not apply to employees of accounting firms, often no employee who would be aware of a potential violation of a Title I rule or a section 802

regulation would be protected from retaliation. Ordinarily no employee of a public company would know whether the company's accounting firm was in violation of a SOX regulation. Congress could not have intended that the only employees who would know about a violation of the accounting firm regulations issued under Title I of SOX, or under section 802, would be unprotected by section 1514A and thus subject to dismissal if they objected to those violations or reported them to the SEC.

V. PROTECTING EMPLOYEES OF CONTRACTORS FROM RETALIATION IS ESSENTIAL TO ACHIEVING THE PURPOSES OF SARBANES-OXLEY

The Sarbanes-Oxley Act was adopted in the wake of the collapse of Enron and several other major corporations. Enron had been the seventh largest corporation in the United States, and its bankruptcy was at the time the largest in American history. In the wake of that bankruptcy filing it quickly became clear that Enron had for years been losing vast sums of money. The company's public statements of its financial position were an elaborate hoax, based in part on a system of accounting gimmicks designed to hide its losses and create the appearance of continued profitability. "Enron ... used thousands of off-the-book entities to overstate corporate profits, understate corporate debts and inflate Enron's stock price.... [Those entities] were used essentially to cook the books and trick both the public and federal regulators

about how well Enron was doing financially." S.Rep. 107-146, pp. 2-3. Some of those schemes involved artificial transactions which not only deceived the public and regulators, but resulted in millions of dollars of profits for Enron officials. "Enron's sudden collapse left thousands of investors holding virtually worthless stock, and most Enron employees with a worthless retirement account. Pension funds nationwide ... literally lost billions on Enron-related investments.... Firefighters, teachers, garment workers, and police officers, who had no way of knowing or finding out about Enron's apparently deceitful conduct ahead of time lost millions in pension fund investments." *Id.*, pp. 3-4. The ensuing scandal riveted national attention for many months, as stories about the plight of those innocent victims combined with regular revelations of the accounting hoaxes that had been used.

Many of the things done by key Enron officials were already clearly crimes; the company's former president, CEO, and others were convicted of serious offenses. What particularly troubled Congress was the extent to which people outside of Enron who could and should have prevented that misconduct – particularly outside accountants and lawyers – had gone along with the schemes, either facilitating what Enron was doing or remaining silent in the face of evident misconduct.

Enron's accounting schemes were concocted with the assistance and approval of its outside accounting firm, Arthur Andersen.

> Much of this conduct occurred with 'extensive participation and structuring advice from [Arthur Andersen],' ... which was simultaneously serving as both consultant and 'independent' auditor for Enron. With the assistance of Anderson and its other auditors, Enron apparently successfully deceived the investing public and reaped millions for some select few insiders....
>
> [T]hrough the use of sophisticated processional advice and complex financial structures, Enron and Andersen were able to paint for the investing public a very different picture of the company's financial health than the true picture revealed.

Id., p. 3. "As investors and regulators attempted to ascertain both the extent and cause of their losses, employees from Andersen were allegedly shredding 'tons' of documents.... Andersen's lawyers issued ambiguous advice encouraging such document destruction...." *Id.*, p. 4.

Arthur Andersen was the most prominent outside firm implicated in the collapse of Enron, but it was far from the only one.

> Enron apparently, with the approval or advice of its accountants, auditors and lawyers, used thousands of off-the-book entities to overstate corporate profits, understate corporate debts and inflate Enron's stock price.... The actions of Enron's ... accountants, ... and lawyers exhibit a "Wild West" attitude which valued profit over honesty.... Much of this

> conduct occurred with "extensive participation and structuring advice from [the accounting firm of Arthur] Anderson, which was.... serving as ... "independent" auditor for Enron.

Id., pp. 2-3. "[P]rofessionals from accounting firms, law firms and business consulting firms, who were paid millions to advise Enron on these practices, assured others that Enron was a solid investment." *Id.*, p. 4.

Congress believed it was the responsibility of those accountants and lawyers, in particular, to stop improper and even criminal conduct, rather than to facilitate or ignore it. "Instead of acting as gatekeepers who detect and deter fraud, it appears that Enron's accountants and lawyers brought all their skills and knowledge to bear in assisting the fraud to succeed and then in covering it up. Congress must reconsider the incentive system that has been set up that encourages accountants and lawyers who come across fraud in their work *to remain silent*." *Id.*, pp. 20-21 (Emphasis added). See Collapse of the Enron Corporation, Hearing before the Senate Committee on Commerce, Science, and Transportation, 107th Cong., 2d Sess. (2002), pp. 2 ("external gatekeepers in the form of auditors and financial analysts failed") (remarks of Sen. Dorgan), 3 ("We also saw the collapse of controls outside the corporation, whether the rating agencies, the auditing firms, the law firms, [or] the analysts....") (remarks of Sen. Fitzgerald). At one hearing, Senator Dorgan asked rhetorically, "Where

were the accountants? Where was the law firm? Where were the security analysts?" *Id.*, p. 2. At another hearing, Senator Hatch commented, "In particular, I would like to know where the lawyers were when Andersen and Enron started shredding documents." Accountability Issues: Lessons Learned from Enron's Fall, Hearing before the Committee on the Judiciary of the United States Senate, 107th Cong., 2d Sess., p. 8 (2002).

The Committee concluded that the reticence of those employees of outside firms, and of Enron itself, was rooted in a culture in which retaliation was both endemic and legal. The financial chicanery had continued in part because those who were aware of the misconduct were deterred from reporting it.

> In a variety of instances when corporate employees at both Enron and Andersen attempted to report or "blow the whistle" on fraud ... they were discouraged at nearly every turn.... An Andersen partner was apparently removed from the Enron account when he expressed reservations about the firm's financial practices in 2000. These examples ... expose a culture, supported by law, that discourage[s] employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally. This "corporate code of silence" not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. The consequences of this corporate code of silence

> for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied.

S.Rep. 107-146, pp. 4-5 (footnote omitted). Federal law prior to the enactment of Sarbanes-Oxley afforded no protection to those who might have reported these schemes.

> [C]orporate whistleblowers are left unprotected under current law. This is a significant deficiency because often, in complex fraud prosecutions, these insiders are the only firsthand witnesses to the fraud. They are the only people who can testify as to "who knew what, and when," crucial questions ... in all complex fraud investigations.

Id., p. 10. "[E]fforts to quiet whistleblowers and retaliate against them for being 'disloyal' or 'litigation risks' transcend state lines. This corporate culture must change, and the law can lead the way." *Id.*

The committee was particularly offended by the response of Enron's outside counsel to a question from Enron about reports of "accounting improprieties."

> [A] shocking e-mail from Enron's outside lawyers to an Enron official was uncovered. This e-mail responds to a request for legal advice after a senior Enron employee, Sherron Watkins, tried to report accounting irregularities at the highest levels of the company in late August 2001. The outside

lawyers counseled Enron, in pertinent part, as follows:

> You asked that I include in this communication a summary of the possible risks associated with discharging (or constructively discharging) employees who report allegations of improper accounting practices: ... Texas law does not currently protect corporate whistleblowers....
>
> ... Of course, Enron's lawyers would claim that they merely provided their client with accurate legal advice....

Id., p. 5. What Enron's counsel had not done was to ask what the improper accounting practices were or suggest that its client should not be engaging in such machinations. Instead, the outside law firm offered what was in effect guidance about how to continue those improprieties by getting rid of an inconvenient whistleblower without triggering a lawsuit. The Committee also noted that "[a]n Andersen partner was apparently removed from the Enron account when he expressed reservations about the firm's financial practices in 2000." *Id.*; see *id.* at 5-6 ("while Enron and Andersen were taking advantage of a system that allowed them to ... engage in ... retaliation against potential witnesses, ... the corporate whistleblowers were faced with daunting challenges.").

The anti-retaliation provision in section 1514A is a linchpin of the Sarbanes-Oxley Act, and its application to employees of outside firms is of central importance. In the years leading up to the collapse

of Enron, the firm's employees and outside accountants and lawyers remained silent, not because they invariably believed what the company was doing was proper, but because in general they were afraid to speak up about practices which they knew were wrong. Hundreds of people had to have been aware of some part of what was happening, or participated in the mass shredding of documents at Arthur Andersen; yet it appears that not one of them picked up the phone and called the SEC or Department of Justice at a time when they could have prevented the harm or impeded the cover-up that followed. Against that background, it is understandable that both the Senate Committee and one of the Senate authors of what became section 1514A characterized that provision as "the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation's financial markets." *Id.*, pp. 10, 19; 148 Cong. Rec. S1788 (remarks of Sen. Leahy), S6440 (remarks of Sen. Leahy) (2002).

The Administrative Review Board correctly observed in *Spinner* that "Congress plainly recognized that outside professionals – accountants, law firms, contractors, agents, and the like – were complicit in, if not integral to, the shareholder fraud and subsequent cover-up officers of the publicly traded Enron perpetrated. Construing Section [1514A] as only protecting employees of publicly traded companies would leave unprotected from retaliation outside accountants, auditors, and lawyers, who are most likely to uncover and comprehend evidence of potential wrongdoing." (Pet.App. 158a). Under the First

Circuit's crabbed reading of section 1514A, if that provision had been in effect prior to the collapse of Enron, it would have been lawful for Arthur Andersen to fire any employee who answered questions from an SEC investigator about the accuracy of Enron's accounting practices or who tried to assist that investigation by refusing to shred Enron-related documents. Enron's outside counsel could have dismissed any associate who pointed out to one of the firm's partners that Enron's letter about Sherron Watkins indicated that Enron was engaging in accounting improprieties that should be looked into. It is impossible to believe that the framers of the Sarbanes-Oxley Act could have intended section 1514A to permit such retaliatory acts.

VI. THE ADMINISTRATIVE REVIEW BOARD DECISION IN *SPINNER* IS ENTITLED TO *CHEVRON* DEFERENCE

If the Court concludes that section 1514A is ambiguous, the Administrative Review Board's interpretation of that provision in *Spinner* is entitled to deference under *Chevron U.S.A. Inc. v. NRDC,* 467 U.S. 837 (1984). This Court has repeatedly held such deference is appropriate where a statute authorizes an agency to engage in adjudication and the agency's decision is reasonable. *United States v. Mead Corp.*, 533 U.S. 218, 227-31 and n.12 (2001). This case easily fits within that rule.

The Secretary is responsible for enforcing section 1514A both through investigation and through formal adjudication. 18 U.S.C. § 1514A(b). Section 1514A(b)(A)

provides that claims under the statute shall be governed by the rules and procedures set forth in section 42121(b) of Title 49. Section 42121(b) in turn provides that, following an initial investigation and proposed findings by the Secretary or his designee, any party dissatisfied with those findings may request "a hearing on the record." 49 U.S.C. § 42121(b)(2)(A). That requirement of adjudication based on a record after opportunity for an agency hearing entitles the parties to the rights and procedures set out in section 554 of the Administrative Procedure Act. 5 U.S.C. § 554. Sections 1514A and 42121(b) establish a number of additional procedures. 18 U.S.C. § 1514A(b)(2); 49 U.S.C. § 42121(b). The Secretary has delegated final adjudicatory authority to the ARB. See 67 Fed. Reg. 64,272, 64,273 (2002). The lower courts have correctly concluded that decisions of the ARB are entitled to *Chevron* deference. *Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dep't of Labor*, 717 F.3d 1121, 1128-29 (10th Cir. 2013); *Wiest v. Lynch*, 710 F.3d 121, 131 (3d Cir. 2013); *Welch v. Chao*, 536 U.S. 269, 276 n.2 (4th Cir. 2008).

As the analysis set out above makes clear, the ARB's interpretation of section 1514A is eminently reasonable. The Board's opinion rests on an exceptionally thoughtful and thorough analysis of the issues of interpretation posed by section 1514A, including a careful evaluation of the possible arguments for a different, narrower construction of the statute. The holding in *Spinner* is consistent with a long series of ARB decisions concluding that section

1514A protects employees of contractors of public companies. (Pet.App. 143a-45a and n.8, 170a-171a).

CONCLUSION

For the above reasons, the decision of the First Circuit should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

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STATUTES AND REGULATIONS INVOLVED

Section 806 of the Sarbanes-Oxley Act of 2002, 116 Stat. 802, provides:

PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES WHO PROVIDE EVIDENCE OF FRAUD.

(a) IN GENERAL. – Chapter 73 of title 18, United States Code, is amended by inserting after section 1514 the following:

"Sec. 1514A. Civil action to protect against retaliation in fraud cases

"(a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES. – No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee –

> "(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange

Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by –

"(A) a Federal regulatory or law enforcement agency;

"(B) any Member of Congress or any committee of Congress; or

"(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

"(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

"(b) ENFORCEMENT ACTION. –

"(1) IN GENERAL. – A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by –

"(A) filing a complaint with the Secretary of Labor; or

"(B) if the Secretary has not issued a final decision within 180 days of the filing of

the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

"(2) PROCEDURE. –

"(A) IN GENERAL. – An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

"(B) EXCEPTION. – Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

"(C) BURDENS OF PROOF. – An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code

"(D) STATUTE OF LIMITATIONS. – An action under paragraph (1) shall be commenced not later than 90 days after the date on which the violation occurs.

"(c) REMEDIES. –

"(1) IN GENERAL. – An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

"(2) COMPENSATORY DAMAGES. – Relief for any action under paragraph (1) shall include –

"(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

"(B) the amount of back pay, with interest; and

"(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

"(d) RIGHTS RETAINED BY EMPLOYEE. – Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.".

(b) CLERICAL AMENDMENT. – The table of sections at the beginning of chapter 73 of title 18, United States Code, is amended by inserting after the item relating to section 1514 the following new item: "1514A. Civil action to protect against retaliation in fraud cases.".

Section 1514A of 18 U.S.C., as amended by the Dodd-Frank Act, 124 Stat. 1848, 1852, provides in pertinent part:

> **Civil action to protect against retaliation in fraud cases**
>
> **(a) Whistleblower protection for employees of publicly traded companies.** – No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c), or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee. . . .
>
> **(2) Procedure.** – . . .
>
> **(D) Statute of limitations.** – An action under paragraph (1) shall be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation.

(E) Jury trial. – A party to an action brought under paragraph (1)(B) shall be entitled to trial by jury.

Section 42121(b)(1)(B) of 49 U.S.C. provides:

(B) Requirements. –

(i) Required showing by complainant. – The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(ii) Showing by employer. – Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(iii) Criteria for determination by Secretary. – The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor

in the unfavorable personnel action alleged in the complaint.

(iv) Prohibition. – Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

Section 1980.101 of 29 C.F.R. provides in pertinent part:

Company representative means any officer, employee, contractor, subcontractor, or agent of a company.

* * *

Employee means an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative.

Section 1980.102(a) of 29 C.F.R. provides:

(a) No company or company representative may discharge, demote, suspend, threaten, harass or in any other manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, has engaged in any of the

activities specified in paragraphs (b)(1) and (2) of this section.

RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

JACKIE HOSANG LAWSON AND
JONATHAN M. ZANG,

Petitioners,

v.

FMR LLC, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

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QUESTION PRESENTED

Section 806 of the Sarbanes-Oxley Act of 2002 provides "[w]histleblower protection for employees of publicly traded companies." 18 U.S.C. § 1514A(a). The question presented is whether this provision covers only employees of public companies.

LIST OF PARTIES

Respondents FMR LLC, Fidelity Management & Research Company, FMR Co., Inc., and Fidelity Brokerage Services LLC disclose the following information:

The named defendant FMR Corp. was merged into a limited liability company prior to the filing of the complaints in this action. FMR LLC is the surviving entity; FMR Corp. no longer exists.

FMR LLC is the parent of Fidelity Management & Research Company. FMR Co., Inc. and Fidelity Brokerage Services LLC are indirect subsidiaries of FMR LLC. FMR LLC is not publicly held, and no publicly held corporation owns 10% or more of Fidelity Management & Research Company, FMR Co., Inc., or Fidelity Brokerage Services LLC.

TABLE OF CONTENTS

Page

STATEMENT 1

SUMMARY OF ARGUMENT 5

ARGUMENT 9

I. THE PRIVATE RIGHT OF ACTION CREATED BY SECTION 806 COVERS ONLY EMPLOYEES OF PUBLIC COMPANIES 11

A. Text 13

B. Structure 24

C. History 30

D. Purpose 37

II. THE ADMINISTRATIVE REVIEW BOARD'S CONSTRUCTION OF STATUTORY TERMS IS ENTITLED TO NO DEFERENCE 46

CONCLUSION 58

TABLE OF AUTHORITIES

Page(s)

CASES

Alexander v. *Sandoval*,
532 U.S. 275 (2001) 38

Am. Express Co. v. *Italian Colors Rest.*,
133 S. Ct. 2304 (2013) 37

Asadi v. *G.E. Energy (USA), L.L.C.*,
720 F.3d 620 (5th Cir. 2013) 43

Associated Gen. Contractors of Cal., Inc.,
v. *Cal. State Council of Carpenters*,
459 U.S. 519 (1983) 39

Barnhart v. *Sigmon Coal Co.*,
534 U.S. 438 (2002) 42

Blue Chip Stamps v. *Manor Drug Stores*,
421 U.S. 723 (1975) 30, 39

Bd. of Governors of Fed. Reserve Sys.
v. *Dimension Fin. Corp.*,
474 U.S. 361 (1986) 37

Bowen v. *Georgetown Univ. Hosp.*,
488 U.S. 204 (1988) 55

Brady v. *Calyon Sec. (USA)*,
406 F. Supp. 2d 307 (S.D.N.Y. 2005) 29, 56

Bhd. of R.R. Trainmen v. *Balt. & Ohio R.R.*,
331 U.S. 519 (1947) 23

Brown v. *Gardner*,
513 U.S. 115 (1994) 18

Burlington N. & Santa Fe Ry. Co. v. *White*,
548 U.S. 53 (2006) 26

Cent. Bank of Denver, N.A.
v. *First Interstate Bank of Denver, N.A.*,
511 U.S. 164 (1994) 10, 16, 39

In re Chapman,
166 U.S. 661 (1897) 20

Chevron U.S.A. Inc. v. *NRDC, Inc.*,
467 U.S. 837 (1984) 46, 47, 49, 50

Christopher v. *SmithKline Beecham Corp.*,
132 S. Ct. 2156 (2012) 55, 57

City of Arlington v. *FCC*,
133 S. Ct. 1863 (2013) 48, 49, 50

Clackamas Gastroenterology Assocs., P.C.
v. *Wells*,
538 U.S. 440 (2003) 33

Daily Income Fund, Inc. v. *Fox*,
464 U.S. 523 (1975) 39

Day v. *Staples, Inc.*,
555 F.3d 42 (1st Cir. 2009) 52

Dean v. *United States*,
556 U.S. 568 (2009) 18

Edward J. DeBartolo Corp. v. *Fla. Gulf*
Coast Bldg. & Const. Trades Council,
485 U.S. 568 (1988) 51

Engine Mfrs. Ass'n
v. *S. Coast Air Quality Mgmt. Dist.*,
541 U.S. 246 (2004) 13

Ervin v. *Nashville Peace & Justice Ctr.*,
2008 WL 4449920
(M.D. Tenn. Sept. 29, 2008) 55

Faragher v. *City of Boca Raton*,
524 U.S. 775 (1998) 26

FCC v. *Fox Television Stations, Inc.*,
129 S. Ct. 1800 (2009) 56

FDA v. *Brown & Williamson Tobacco Corp.*,
529 U.S. 120 (2000) ..... *passim*

FEC v. *Democratic Senatorial Campaign Comm.*,
454 U.S. 27 (1981) 48

Field v. *BKD, LLP*,
2011 WL 2165860
(DOL ARB May 27, 2011) 56

Fleszar v. *Am. Med. Ass'n*,
2009 WL 891347
(DOL ARB Mar. 31, 2009) 56

Fleszar v. *U.S. Dep't of Labor*,
598 F.3d 912 (7th Cir. 2010) 24, 25, 55, 56

Free Enter. Fund v. *PCAOB*,
130 S. Ct. 3138 (2010) 41

Gonzales v. *Oregon*,
546 U.S. 243 (2006) 32

Gustafson v. *Alloyd Co.*,
513 U.S. 561 (1995) 32

Hui v. *Castaneda*,
559 U.S. 799 (2010) 13

INS v. *Nat'l Ctr. for Immigrants' Rights, Inc.*,
502 U.S. 183 (1991) 22

Janus Capital Grp., Inc. v. *First Derivative Traders*,
131 S. Ct. 2296 (2011) ..... *passim*

Jie v. *Liang Tai Knitwear Co.*,
89 Cal. App. 4th 654 (2001) 44

Johnson v. *United States*,
529 U.S. 694 (2000) 20

Jones v. *Harris Assocs. L.P.*,
559 U.S. 335 (2010) 1, 10, 44, 45

Kasten v. *Saint-Gobain Performance Plastics Corp.*,
131 S. Ct. 1325 (2011) 12

Lockheed Martin Corp. v. *ARB*,
717 F.3d 1121 (10th Cir. 2013) 30, 47

Martin v. *OSHRC*,
499 U.S. 144 (1991) 46, 50, 51

Merrill Lynch, Pierce, Fenner & Smith Inc. v. *Dabit*,
547 U.S. 71 (2006) 39

Mertens v. *Hewitt Assocs.*,
508 U.S. 248 (1993) 39

Mohamad v. *Palestinian Authority*,
132 S. Ct. 1702 (2012) 39

Mohasco Corp. v. *Silver*,
447 U.S. 807 (1980) 20

Morrison v. *Nat'l Austl. Bank*,
130 S. Ct. 2869 (2010) 39

Nat'l Collegiate Athletic Ass'n v. *Smith*,
525 U.S. 459 (1999) 47

N. Haven Bd. of Educ. v. *Bell*,
456 U.S. 512 (1982) 35

Pegram v. *Herdrich*,
530 U.S. 211 (2000) 39

Pinter v. *Dahl*,
486 U.S. 622 (1988) 54

Powerex Corp. v. *Reliant Energy Servs., Inc.*,
551 U.S. 224 (2007) 17

SEC v. *Chenery Corp.*,
332 U.S. 194 (1947) 50

SEC v. *Zandford*,
535 U.S. 813 (2002) 50

Simpson v. *United States*,
435 U.S. 6 (1978) 31

Skidmore v. *Swift & Co.*,
323 U.S. 134 (1944) 52, 53

Spinner v. *David Landau & Assocs., LLC*,
2012 WL 2073374
(DOL ARB May 31, 2012) ..... *passim*

Stoneridge Inv. Partners, LLC
v. *Scientific-Atlanta, Inc.*,
552 U.S. 148 (2008) 10, 37, 38, 39

Tides v. *Boeing Co.*,
644 F.3d 809, 811 (9th Cir. 2011) 27

Tumban v. *Biomérieux, Inc.*,
2007 WL 778426
(M.D.N.C. Mar. 13, 2007) 56

United Parcel Serv., Inc. v. *Mitchell*,
451 U.S. 56 (1981) 47

United Sav. Ass'n of Tex.
v. *Timbers of Inwood Forest Assocs.*,
484 U.S. 365 (1988) 17

United States v. *Fisher*,
6 U.S. (2 Cranch) 358 (1805) 23

United States v. *Mead Corp.*,
533 U.S. 218 (2001).....50, 53

Univ. of Tex. Sw. Med. Ctr. v. *Nassar*,
133 S. Ct. 2517 (2013).....*passim*

Vance v. *Ball State Univ.*,
133 S. Ct. 2434 (2013).....30, 53, 54

Welch v. *Chao*,
536 F.3d 269 (4th Cir. 2008).....47

Whitman v. *Am. Trucking Ass'ns*,
531 U.S. 457 (2001).....22, 32, 48

Wiest v. *Lynch*,
710 F.3d 121 (3d Cir. 2013) 47

Wilder v. *Va. Hosp. Ass'n*,
496 U.S. 498 (1990).....38

CONSTITUTIONAL PROVISION

U.S. Const. art. I, § 7, cl. 2 22

STATUTES

12 U.S.C. § 1790b 24

15 U.S.C. § 78u-6.....43

15 U.S.C. § 80a-15(c) 1

15 U.S.C. § 80b-1 *et seq.* 1

49 U.S.C. § 42121 .....24, 28, 49

Sarbanes-Oxley Act of 2002,
Pub. L. No. 107-204, 116 Stat. 745 ..... *passim*
Section 105,
15 U.S.C. § 7215(c)(4) 41
Sections 201-203,
15 U.S.C. § 78j-1(g)-(j) 42
Section 301,
15 U.S.C. § 78j-1(m)(4) 12
Section 306,
15 U.S.C. § 7244(a)(3) 49
Section 307,
15 U.S.C. § 7245 41
Section 308,
15 U.S.C. § 7246 10
Section 501,
15 U.S.C. § 78*o*-6(a) 34
Section 602,
15 U.S.C. § 78d-3(a) 41
Section 604,
15 U.S.C. § 80b-3(e) 10
Section 802,
18 U.S.C. §§ 1519, 1520 42
Section 806,
18 U.S.C. § 1514A ..... *passim*
Section 1107,
18 U.S.C. §§ 1513(e), 1515(a)(4) 42

Dodd-Frank Wall Street Reform and
Consumer Protection Act,
Pub. L. No. 111-203, 124 Stat. 1376
(2010) ..... *passim*
Section 922 ..... 14, 35, 43, 44
Section 929A 14, 35

REGULATIONS

29 C.F.R. § 1980.106 49
29 C.F.R. § 1980.107 49
29 C.F.R. § 1980.110 49
29 C.F.R. § 1980.112(a) 49
67 Fed. Reg. 64,272 (Oct. 17, 2002) 49
69 Fed. Reg. 52,104 (Aug. 24, 2004) 54
75 Fed. Reg. 3,925 (Jan. 15, 2010) 54

OTHER AUTHORITIES

148 Cong. Rec. H5474
(daily ed. July 25, 2002) 32
148 Cong. Rec. S7351
(daily ed. July 25, 2002) 31
156 Cong. Rec. S3349
(daily ed. May 6, 2010) 36
David J. Barron & Elena Kagan,
Chevron's Nondelegation Doctrine,
2001 Sup. Ct. Rev. 201 53
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Public Company Deskbook: Sarbanes-Oxley and Federal Governance Requirements (2d ed. & Supp. 2013) 11

Lewis Carroll,
Through the Looking-Glass (1871), *reprinted in The Complete Works of Lewis Carroll* (Modern Library 1936).....21

Frank H. Easterbrook,
Statutes' Domains,
50 U. Chi. L. Rev. 533 (1983).....38

H.R. 4505, 108th Cong. (2004).....34

National Conference of State Legislatures,
State Whistleblowers Laws (Nov. 2010) 44

Antonin Scalia,
Judicial Deference to Administrative Interpretations of Law,
1989 Duke L.J. 511 53

SEC, *Annual Report on NRSROs* (Mar. 2012).....36

S. 2059, 108th Cong. (2004) 34

S. Rep. No. 107-146 (2002).....*passim*

STATEMENT

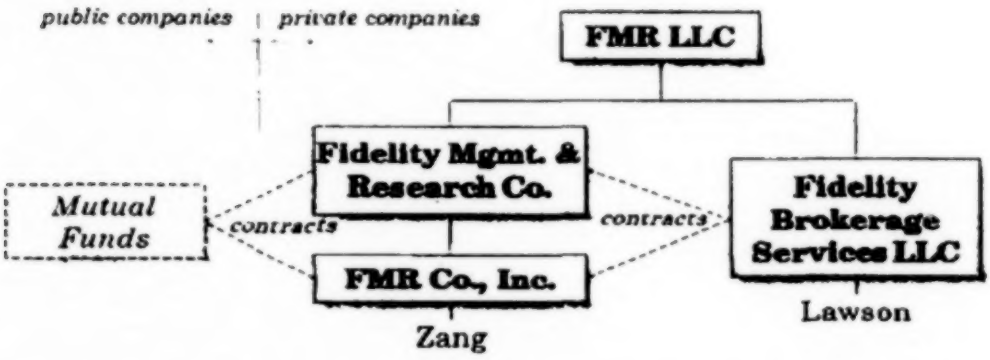
Petitioners are former employees of *private companies*. They filed this suit under Section 806 of the Sarbanes-Oxley Act of 2002 (SOX), which creates a private right of action for employees of certain *public companies* who suffer retaliation for engaging in protected "whistleblowing" activity. 18 U.S.C. § 1514A (Pet. App. 200a). The court of appeals ordered dismissal because Section 806 covers only employees of public companies. Pet. App. 10a-18a.

1. A mutual fund (or "investment company") is a public company whose business is to buy, sell, and hold securities for the benefit of its investor-shareholders. *See* U.S. Br. 25-26 n.3. Under the Investment Company Act of 1940, each mutual fund must retain an adviser to make investment recommendations or decisions pursuant to a written agreement approved annually by the fund's investors or trustees. 15 U.S.C. § 80a-15(c); *Jones* v. *Harris Assocs. L.P.*, 559 U.S. 335, 339 (2010). The adviser, in turn, is subject to extensive federal regulation and oversight under the Investment Advisers Act of 1940. 15 U.S.C. § 80b-1 *et seq.* A mutual fund and its adviser are different companies, with distinct ownership and governance, and the law recognizes and enforces this separateness. *See Janus Capital Grp., Inc.* v. *First Derivative Traders*, 131 S. Ct. 2296, 2299, 2304 (2011).

Two respondents, Fidelity Management & Research Company and FMR Co., Inc., advise certain mutual funds pursuant to contracts. A third respondent, Fidelity Brokerage Services LLC, is a broker-dealer that buys and sells securities but does not advise mutual funds. The fourth respondent is a holding company that does not contract directly with

any mutual funds. All respondents are privately held companies.

2. Petitioner Zang was an employee of FMR Co., Inc. and petitioner Lawson worked for Fidelity Brokerage Services LLC.



a. Zang's responsibilities included analyzing companies, managing the investments of several mutual funds, and preparing reports for fund investors. In July 2005, he was terminated for poor job performance.

Zang filed a Section 806 complaint with the Department of Labor (DOL), alleging that his termination was actually caused by an unsolicited 12-page, single-spaced memorandum he sent to about 100 colleagues. C.A. App. 71-78. Zang's "manifesto" criticized what he saw as failings in leadership, management, and compensation methods within FMR Co., Inc. Among many unrelated observations, Zang stated that a draft public filing he had reviewed as part of his ordinary duties, while "technically correct," "portray[ed] inaccurately the relative importance of compensation" of analysts (J.A. 112)—*i.e.*, employees in his own position. J.A. 117, 122-23.

DOL dismissed Zang's complaint based on its investigator's finding that the manifesto did not constitute protected activity because it did not report fraud

or violations of the securities laws. J.A. 146-49. The investigator further found that Zang's memorandum "focused attention on the fact that he was not doing his job." J.A. 148; *see also* J.A. 146 (one "core" allegation "lack[ed] credibility" and another was "completely without merit"). An Administrative Law Judge (ALJ) affirmed the dismissal on the alternative ground that Section 806 covers only employees of public companies. J.A. 198. Before the Administrative Review Board (ARB) had the opportunity to review that decision, Zang initiated a *de novo* action in district court. *See* J.A. 62-92. (Zang also filed a separate suit in state court alleging disability discrimination and retaliation. *Zang* v. *FMR LLC*, No. 08-02745 (Mass. Super. Ct. filed June 19, 2008).)

b. Lawson managed a team of analysts responsible for "cost allocation"—essentially, determining which brokerage costs were attributable to the sale and servicing of funds advised by Fidelity Management & Research Company and its affiliates, as distinguished from other products and services. Lawson was not selected for a promotion in September 2006, and she resigned in September 2007.

After she did not receive the promotion, Lawson filed a Section 806 complaint with DOL, which she supplemented over time with three additional administrative complaints. D.C. Dkt. No. 22, Exhibits 1-4. The thrust of her allegations was that her working conditions had deteriorated after she disagreed with certain cost allocation methods and outcomes. Pet. App. 80a-82a. Raising such disagreements was part of Lawson's job at the time, but in this instance (and others) she was overruled by those who had a different understanding of the underlying business.

Had DOL completed its investigation, it likely would have dismissed Lawson's administrative complaints because she engaged in no protected activity. The decisions with which she disagreed did not directly affect mutual fund shareholders, and none involved a violation of any federal securities law or constituted "fraud." Indeed, Lawson contemporaneously acknowledged that the issues she had raised in her initial complaint could be "chalked up to miscommunications, differences in understandings or professional opinions, or simply mistakes." D.C. Dkt. No. 22-3, at 13. Lawson pretermitted the administrative proceedings, however, by filing a *de novo* action in district court. *See* J.A. 11-61.

3. In the district court, respondents moved to dismiss both complaints on the ground that Lawson and Zang, as employees of private companies, could not bring a civil action under Section 806. Respondents also maintained that petitioners had engaged in no protected activity and that their allegations of misconduct were entirely meritless. The district court, addressing the two cases jointly, ruled that Section 806 covers employees of private companies that contract with public companies. Pet. App. 96a-123a. Recognizing that this gave Section 806 a "notably expansive scope untethered to the purpose of the statute" (*id.* at 111a), the district court also ruled that employees of private companies could invoke Section 806 only if their allegations of fraud involved shareholders of public companies. *Id.* at 115a.

4. The court of appeals reversed.

a. The majority concluded that "only the employees of the defined public companies are covered" by Section 806. Pet. App. 17a. The court explained that Section 806 "first identifies covered employers:

those with a class of securities registered under section 12 of the 1934 Act or those that file reports with the SEC pursuant to section 15(d) of the 1934 Act." *Ibid.* Those entities, which everyone agrees are "public companies" (*see* Pet. Br. 12; U.S. Br. 3 n.2), may not retaliate "against their own employees who engage in protected activity." Pet. App. 17a. Section 806 further identifies representatives of such employers, including officers and contractors, that "are also barred from retaliating against employees of the covered public-company employer who engage in protected activity." *Id.* at 18a (emphasis added). The court of appeals rejected, both "[a]s a matter of language" and "[a]s a matter of logic," petitioners' contention that "because [Section 806] forbids retaliation *by* 'any officer, employee, contractor, subcontractor, or agent,' of a public company, that provision must forbid retaliation *against*" those secondary actors' "own employee[s]." *Ibid.*

b. Judge Thompson dissented. Pet. App. 52a. In her view, making a private right of action available to employees of contractors to public companies would further the remedial "purposes" of SOX. *Id.* at 60a-61a.

SUMMARY OF ARGUMENT

Section 806 of the Sarbanes-Oxley Act creates a private right of action for employees of public companies who engage in protected activity; it does not cover individuals who are employed by privately held firms. Therefore the judgment below should be affirmed.

I. The text, structure, history, and purpose of SOX all confirm that Section 806 covers only public company employees.

A. The statutory text provides that no public company, or representative of such company, may retaliate against an employee because of protected activity by that employee.

1. By its terms, Section 806 applies to "employees of publicly traded companies." The protected "employees" are those of the public company that is the object of the entire statutory scheme. The subordinate clause listing company representatives does not enlarge the class of protected employees; it simply makes specified additional actors secondarily liable. The statutory prohibition—*no public company, or any representative of such company, may retaliate against an employee because of any protected activity by the employee*—can only be read as covering public company employees. Section 806 specifically defines "employee" to mean "employee ... of such company." Giving this word the same meaning each time it appears in the same statutory subsection means that coverage extends only to public company employees. Petitioners and the government suggest that the single word "employee" should be given two (or more) meanings within the same sentence, but there is no intrinsic or extrinsic evidence supporting such a bizarre outcome.

2. The title and headings of Section 806 further demonstrate that the private right of action is available only to employees of public companies. Congress could not have spoken more clearly: Section 806 provides "protection for employees of publicly traded companies." Although petitioners and the government ask the Court to ignore this statutory language, it was passed by Congress and signed into law by the President; these summaries cannot be disregarded in construing the statutory provision they describe.

B. The structure of Section 806 confirms that the civil action created by SOX covers only employees of public companies. It allows such employees to sue the public company as a primary actor and designated representatives of the public company as secondary actors. Contrary to petitioners' suggestion, this is entirely consistent with the protected acts, defenses, and remedies under Section 806: Where the public company goes bankrupt (as Enron did), the statute provides additional protection by authorizing monetary recovery against specified company representatives. And allowing only public company employees to sue provides a readily administrable standard for determining whose claims can be adjudicated.

C. Evidence before and after SOX was enacted confirms that Section 806 is limited to public company employees.

1. Senator Sarbanes, the sponsor of the legislation, unequivocally stated that it "applies exclusively to public companies" and is "not applicable to private companies." Public companies and their employees are discussed throughout the legislative history, but private companies are not. It is unfathomable that Congress meant to authorize civil lawsuits by employees of *millions* of private employers with nary a word to that effect.

2. Just two years after SOX was enacted, Congress considered but rejected legislation that would have made investment advisers subject to Section 806. Petitioners and the government are thus asking this Court to amend Section 806 in precisely the way that Congress has already rejected. Moreover, the Dodd-Frank Act of 2010 amended Section 806 to cover employees of certain privately held contractors

(credit rating agencies); this is additional evidence that Section 806 as enacted in 2002 did *not* cover employees of private companies.

D. The Court should reject petitioners' policy-based plea to judicially amend Section 806 to extend the private right of action from the employees of about 4,500 publicly traded companies to those of more than 6 million private companies. Balancing the costs and burdens of regulation, including private civil litigation, is a legislative rather than a judicial task. The congressional decision to apply Section 806 only to employees of public companies is consonant with the objectives of SOX—to protect investors by enhancing disclosure under the securities laws—because only public companies must make such disclosures. Congress also imposed additional requirements on accountants and lawyers who provide services to public companies, without regulating other service providers such as investment advisers and their affiliates. SOX was a calibrated response to identified dysfunctions in the financial markets, not a catch-all.

II. Decisions of the Department of Labor's Administrative Review Board construing the terms of Section 806 are entitled to no deference.

1. Petitioners elected to bypass the ARB in favor of *de novo* proceedings in district court. Accordingly, there is no ARB decision in either petitioner's case to which the Court could "defer." Moreover, the Court need not decide whether ARB decisions in general are entitled to deference because that question was neither pressed nor passed upon below.

2. The ARB gets no deference in construing the statutory term "an employee" because there is no ambiguity to resolve. Even if there were, formal

agency adjudications warrant deference only where Congress has actually delegated policymaking power to an agency. Petitioners and the government have not cited a single case in which this Court has deferred to an adjudicative decision made by a tribunal within an agency that lacks policymaking authority. Nothing in SOX authorizes the Secretary of Labor to issue substantive rules interpreting SOX or otherwise to play a policymaking role. The ARB cannot exercise powers that DOL does not have. The vast majority of Section 806 cases are also decided *de novo* in federal court, further indicating that Congress saw no need for DOL adjudicators to play an interpretive role.

3. Moreover, the single ARB decision on which petitioners and the government rely is inconsistent with the statutory text, structure, history and purpose. The ARB's disagreement with the First Circuit was driven by DOL's procedural regulations, which were "not intended to provide interpretations of the Act." The Secretary conceded in the court below that the regulations are not entitled to deference. The ARB's decision also conflicts with every extant judicial decision and departs without reasoned analysis from previous administrative decisions. Indeed, the *post hoc* nature of the decision as applied to this case further undermines its legitimacy. It is entitled to no deference.

ARGUMENT

Section 806 of the Sarbanes-Oxley Act was enacted to provide "*protection for employees of publicly traded companies.*" Pub. L. No. 107-204, 116 Stat. 745, 802 (2002) (emphasis added). Because petitioners were employed by *private* companies, the court of appeals correctly concluded that they cannot bring a

civil action under Section 806. To reverse, this Court would have to conclude that the statute does not mean what it says, and judicially amend Section 806 to extend its coverage from the employees of a few thousand public companies to those of the millions of private employers that contract with public companies.

Section 806 as enacted does not cover employees of privately held investment advisers to mutual funds. The unique structure of this industry is well known to Congress, and investment advisers are separately, and extensively, regulated. *See Jones* v. *Harris Assocs. L.P.*, 559 U.S. 335, 339-40 (2010). Where Congress intended to address investment advisers in SOX, it did so by amending the Investment Advisers Act of 1940 (SOX §§ 308, 604, 15 U.S.C. §§ 7246, 80b-3(e)). Indeed, just two years later, Congress *rejected* legislation that would have amended Section 806 to include privately held investment advisers and their affiliates (such as respondents). These and other indicia show that Congress did not regulate investment advisers indirectly through Section 806.

This Court has long held in this context that identifying the proper parties to sue or be sued for securities fraud is a job for Congress, not the judiciary. *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 164-65 (2008); *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187-88 (1994). That principle is of "particular significance" here "because claims of retaliation are being made with ever-increasing frequency." *Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2531 (2013). And this Court has already repudiated the argument, exhumed by petitioners here, that different rules should apply to

the mutual fund industry. *See Janus Capital Grp., Inc.* v. *First Derivative Traders*, 131 S. Ct. 2296, 2304 (2011).

Section 806 as enacted authorizes employees of public companies to sue, but employees of private companies are not covered. Given the statute's clear language, "it would be improper to conclude that what Congress omitted from the statute is nevertheless within the scope." *Nassar*, 133 S. Ct. at 2528. Therefore the decision below should be affirmed.

I. THE PRIVATE RIGHT OF ACTION CREATED BY SECTION 806 COVERS ONLY EMPLOYEES OF PUBLIC COMPANIES

SOX was a legislative response to the collapse of Enron Corporation, a publicly traded company, which adversely affected investors, including mutual funds, who lacked knowledge of behind-the-scenes financial manipulation. In an extensive set of interlocking provisions, SOX established procedural and substantive reforms for public companies as well as the law and accounting firms that advise them. *See* 3 John T. Bostelman *et al.*, *Public Company Deskbook: Sarbanes-Oxley and Federal Governance Requirements*, at app. A-38 to A-44 (2d ed. & Supp. 2013).[1]

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[1] Title I created the Public Company Accounting Oversight Board (PCAOB) to oversee accountants who audit public companies. Title II addressed auditor independence. Title III imposed limitations on public companies. Title IV required enhanced public company financial disclosures. Title V required the SEC to regulate conflicts of interest involving analysts who cover public companies. Title VI expanded the SEC's authority over public companies. Title VII required additional studies. Title VIII, among other things, created the private right of action at issue here. Title IX increased penalties for white-collar

These reforms include a new requirement for public companies to establish and maintain internal compliance systems for receiving, reviewing, and responding to employee complaints. *See* SOX § 301, 15 U.S.C. § 78j-1(m)(4). Congress imposed this costly requirement only on public companies—which choose to access the capital markets, and thus voluntarily assume greater regulatory responsibilities including compliance with the securities laws. Congress did not impose internal reporting requirements on private companies—which, by forgoing public funding, also avoid complex disclosure and other regulatory issues under the securities laws.

One of the enforcement mechanisms for the newly mandated compliance systems is a new private right of action for employees of public companies who suffer retaliation after reporting allegations of fraud, either internally or to specified external sources. SOX § 806, 18 U.S.C. § 1514A. The obligation and enforcement mechanisms (or, from the employee's perspective, right and remedy) are thus both complementary and coextensive.

The text, structure, history, and purpose of SOX all confirm that Section 806 covers only public company employees. *See Nassar*, 133 S. Ct. at 2524-35 (employing this mode of statutory construction in the context of a retaliation claim); *cf. Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1330-31 (2011) (similar).

[Footnote continued from previous page]

crimes. Title X required public company CEOs to sign tax returns. And Title XI created criminal liability for document destruction and retaliation.

A. Text

Section 806 provides that no public company—or any officer, employee, contractor, subcontractor, or agent of "such company"—may retaliate against "an employee" for engaging in protected whistleblowing activity. The statute thus imposes primary liability against public companies, and secondary liability against designated representatives of public companies, for retaliating against employees of public companies.

1. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n* v. *S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (internal quotation marks omitted); *see also, e.g.*, *Hui* v. *Castaneda*, 559 U.S. 799, 805 (2010) (inquiry "begins and ends with the text").

Petitioners and the government focus on the term "an employee." *See* Pet. Br. 15-21; U.S. Br. 12-14. But this Court must construe the entire provision. *Nassar*, 133 S. Ct. at 2530 ("Text may not be divorced from context"). The statutory provision enacted by Congress admits of just one conclusion: The private right of action created by Section 806 covers only employees of public companies.

Here is the statutory provision the Court must interpret—*tolle, lege*:

SEC. 806. PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES WHO PROVIDE EVIDENCE OF FRAUD.

* * *

§ 1514A. Civil action to protect against retaliation in fraud cases

(a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES.—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee ... to provide information ... regarding any conduct which the employee reasonably believes constitutes a violation of [18 U.S.C. §§] 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders ....

Pub. L. No. 107-204, 116 Stat. at 802-03 (codified as amended at 18 U.S.C. § 1514A) (quotation marks omitted).[2]

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[2] As explained further below, Section 806 was amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 922(b), (c), 929A, 124 Stat. 1376, 1848, 1852 (2010).

a. The statute's domain is clear from the outset. It first states, twice, that the new civil action provides "protection for employees of publicly traded companies," and then defines with specificity which companies those are: companies "with a class of securities registered under section 12 of the Securities Exchange Act of 1934 or those that file reports with the SEC pursuant to section 15(d) of the 1934 Act." Pet. App. 17a. The statute itself thus establishes the metes and bounds of coverage.

Diagramming Section 806 makes clear that the protected "employee" is employed by the public company that is the primary object of the statute.

Text	Definition
No [public] **company**	Section 12 registrants or Section 15(d) reporters.
, or any [representative] **of such company,**	Officer, employee, contractor, subcontractor, or agent.
may [retaliate]	Discharge, demote, suspend, threaten, harass, or in any other manner discriminate ... in the terms and conditions of employment.
against an employee	
because of any [protected activity] **by the employee.**	Lawfully providing information regarding conduct believed to violate specified laws and regulations relating to fraud against shareholders.

The principal prohibition is simple: "No [public] company ... may [retaliate] against an employee." As petitioners acknowledge, this means the public company's *own* employees. Pet. Br. 15-16 n.10. The insertion of the subordinate clause regarding company representatives does not modify the term "an employee" in the principal clause; it simply extends the prohibition to specified secondary actors so that the public company may not do indirectly that which it is prohibited from doing directly.[3]

Petitioners unwittingly prove this point. "If a new homeowner is advised to 'be nice to neighbors,'" they say, "the advice obviously is about the homeowner's own neighbors, not to those of someone else." Pet. Br. 16. Extending the analogy to track Section 806—"no homeowner, or guest or visitor of such homeowner, shall be rude to a neighbor"—makes clear that the protected persons remain the homeowners' neighbors, not neighbors of the guests or visitors.

Section 806 protects the public company's employees: ***No public company, or any representative of such company, may retaliate against an employee because of any protected activity by the employee***. Even petitioners concede that this reading is *plausible* (Pet. Br. 34); and we respectfully submit that it goes well beyond plausibility—it is the

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[3] It was necessary for Congress to specify the "categories of defendants who may be liable" beyond the company itself, because the securities laws do not allow implied secondary liability in a private civil action. *Central Bank*, 511 U.S. at 179-80. Had Congress not specified the secondary actors subject to liability, a whistleblower could have sued only the public company employer, and not (for example) an officer or contractor who instigated or participated in the retaliation.

most coherent and sensible reading of the statutory language in context.

b. Subsection (a) uses the word "employee" three times in a single sentence. "A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007); *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). Applying this principle here, and giving a uniform construction to the word "employee" in Section 806, leads inexorably to the conclusion that this provision covers only employees of the defined public companies, regardless of whether they are victims or perpetrators.

At its first appearance, "employee" is expressly defined to mean "employee ... of such company," *i.e.*, public company. "Employee" then appears twice more in the same subsection, and it should be given the same meaning—"public company employee"—in each instance. Congress, having so defined "employee," did not have to repeat that definition each time it was used within the same sentence. It means "public company employee" throughout.

Petitioners' sole rejoinder is that Section 806 contains "two usages of 'employee'—one expressly limited by the phrase 'of such company,' and one not"; and they invoke the canon that "[w]here Congress includes particular language in *one section* of a statute but omits it in *another section* of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Pet. Br. 33 (emphases added; internal quotation omitted). But that canon comes into play in differentiating between differing phrases in *differ-*

ent statutory sections. *See Dean* v. *United States*, 556 U.S. 568, 573 (2009). It does not apply where, as here, the disputed term—"employee"—appears in the same section (indeed, in the same sentence).

The correct canon is that identical words in the same statutory section are presumed to share an identical meaning; and this presumption is "at its most vigorous when a term is repeated within a given sentence." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). Yet petitioners and the government do not even acknowledge this principle, much less attempt to overcome the vigorous presumption that the same words have the same meaning within the same statutory provision.

Importantly, petitioners and the government *agree* that "an employee" means "public company employee," at least with respect to claims against "officers." According to petitioners, when a statute prohibits a company official from harming an employee, "the normal meaning ... is that the official may not take the prohibited action against an employee of the entity for which the official works." Pet. Br. 15 n.10; *see also id.* at 12 ("this aspect of the statute imposes personal liability on an individual who engages in retaliation on behalf of a public company"). Likewise, the government admits that "the prohibition against an 'officer' ... retaliating against 'an employee' is meant to impose personal liability on corporate officers ... who are involved in retaliation against other employees of their employer." U.S. Br. 16 (citing Pet. App. 149a). So far, so good.

Yet, when it comes to claims against "contractors," petitioners and the government change their tune. According to petitioners, "an employee" in this context means *the contractor*'s employee, rather

than—or, perhaps, in addition to—the public company's employee. Pet. Br. 14-15, 18. The government, similarly, suggests that "an employee" could be construed to cover any employee of the listed company representatives. U.S. Br. 12.

These efforts to broaden the statute's reach beyond public company employees cannot be reconciled with the fact that Congress elected to cover "*an* employee" (and later "*the* employee"), rather than "any employee." As the government notes (U.S. Br. 13), the expansive "any" is used throughout Section 806 in a variety of contexts. But it is conspicuously absent in connection with the protected "employee," thereby making clear that the law applies only to a subset of employees: the previously defined public company employees.

As the district court recognized, allowing any employee of any person or entity that acts as a contractor, subcontractor, or agent (or, for that matter, officer or employee) of a public company to sue under Section 806 would enlarge the private right of action beyond any conceivable congressional purpose. Pet. App. 111a. To avoid that absurd result, the district court adopted a "limiting principle" under which only employees who report securities fraud at their public company clients would be covered. *Id.* at 96a-123a. Neither petitioners nor their *amici*, however, embrace this limitation. As a result, their proposal is totally untethered from the statute.

Expanding Section 806 to create a private right of action for employees of the listed company representatives in a suit against their employers would also yield the illogical result that the statute prohibits every officer and every employee from harassing or intimidating his or her own employees, which they

typically do not even have. A proffered interpretation that produces such anomalies defies basic rules of statutory construction. *See, e.g.*, *Johnson* v. *United States*, 529 U.S. 694, 707 n.9 (2000) ("[N]othing is better settled, than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion") (quoting *In re Chapman*, 166 U.S. 661, 667 (1897)).

The government recognizes but fails to solve this problem. After arguing that "an employee" should be read to include any employee of all the listed company representatives (U.S. Br. 12), the government refuses to eat its own cooking: It *admits* that employees of "officers" are *not* covered. *Id.* at 16 (rejecting coverage for "household employee of an officer or employee of a public company"). Petitioners, too, disclaim coverage for officers' employees even while insisting that Section 806 reaches contractor's employees. Pet. Br. 12.

Neither petitioners nor the government offer any principled basis for reading "an employee" differently based on which of the statutorily identified public company representatives is named as a respondent—that is, to give it one meaning if the respondent is an "officer" and a different meaning if the respondent is a "contractor." It would be extraordinary for Congress to use the same word—"employee"—in different ways within a single sentence, or for this Court to so construe the word. *See Mohasco Corp.* v. *Silver*, 447 U.S. 807, 826 (1980) ("In the end, we cannot accept respondent's position without unreasonably giving the word 'filed' two different meanings in the same section of the statute"). There is no intrinsic or

extrinsic evidence supporting such a bizarre result here.[4]

The statutory phrase "an employee" must be given the same construction with respect to all five secondary actors ("officer, employee, contractor, subcontractor, or agent of such [public] company"), which are listed together, in the same clause, set off by commas from the rest of the sentence. The construction that applies to officers must be applied to contractors, and *vice versa*. Accordingly, just as Section 806 prohibits "officers" from retaliating against public company (as distinguished from their own) employees, it prohibits "contractors" from retaliating against public company (as distinguished from their own) employees.

2. The title and the headings eliminate any doubt that Section 806 provides a private right of action only to public company employees. *See Nassar*, 133 S. Ct. at 2529 (title of amendment to Title VII "indicates that Congress determined to address only claims of status-based discrimination, not retaliation"). Section 806 begins by stating its purview: "Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud." The next heading refers to a "[c]ivil action to protect against retaliation in fraud cases," and then the first part of the anti-retaliation provision itself reiterates that it

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[4] Likewise, the government may not create an "ambiguity" simply by announcing irreconcilable constructions of the same statutory language. *Compare* U.S. Br. 12 *with* Lewis Carroll, *Through the Looking-Glass* (1871), *reprinted in The Complete Works of Lewis Carroll* 138, 214 (Modern Library 1936) ("'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less'").

provides "[w]histleblower protection for employees of publicly traded companies." Congress could not have made clearer that the "employees" with whom the provision is concerned are those of public companies. *See* Pet. App. 19a-20a.

Petitioners devote an entire section of their brief to the headings (Pet. Br. 41-49), yet protest that those same "headings shed *no* light" on the issue before the Court. *Id.* at 9 (emphasis added); *see also* U.S. Br. 17-19. The notion that statutory text, passed by Congress and signed by the President, sheds *no* light on the construction of that same statute blinks reality. These are Laws (U.S. Const. art. I, § 7, cl. 2), not inkblots.

Petitioners and the government ask the Court to ignore the title and headings because the statute *is not* ambiguous. Pet. Br. 47-49; U.S. Br. 18. But elsewhere they argue that Section 806 *is* ambiguous, because they want this Court to defer to the ARB's interpretation. Pet. Br. 61; U.S. Br. 9-10. Statutory interpretation is not a game of heads-I-win, tails-you-lose. *If* there is ambiguity, as they intermittently insist, petitioners' and the government's arguments against relying on the title and headings dissolve. *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 483 (2001) (statutory "title ... may only shed light on some ambiguous word or phrase in the statute itself") (internal quotation marks and alteration omitted). The headings "cannot override the statute's text" (U.S. Br. 7); but they certainly can confirm the meaning of "generic" terms in the text. *INS* v. *Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189-90 (1991). The headings here confirm that "an employee" in the text means "public company employee."

In asking the Court to disregard the words that Congress used, petitioners and the government rely exclusively on *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Railroad*, 331 U.S. 519 (1947). *See* U.S. Br. 17-18; Pet. Br. 47-48. But *Trainmen* and its antecedents establish the supremacy of the statutory text over titles and headings in cases of *conflict*. *See* 331 U.S. at 528-29; *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). Those cases do not preclude a court from using titles and headings to confirm the apparent meaning of the text. And here there is no conflict between the statutory text and the headings under Section 806—one merely expounds upon the other. Under these circumstances, the headings and titles must "claim[] a degree of notice." *Fisher*, 6 U.S. (2 Cranch) at 386.

Petitioners also protest that the headings are "short-hand" for the statutory terms. Pet. Br. 46-48. Yet, while "whistleblower" might be short-hand for an employee who engages in protected activity, "employees of publicly traded companies" clearly defines those whistleblowers who may pursue a civil action under Section 806. The express and repeated reference to "publicly traded companies" cannot be characterized as "short-hand" for the 99% of companies in America that are *not* publicly traded.[5]

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[5] Petitioners and the government note that Section 15(d) report-filers are not "publicly traded." Pet. Br. 45; U.S. Br. 18. That is because their securities are offered directly to the public rather than on an exchange; but they are public companies that have accessed the capital markets, and as such they are subject to the internal reporting and other requirements of SOX. Moreover, not all Section 15(d) companies are mutual funds (Pet. Br. 11) and in any event some mutual funds have employees (*id.* at 39-40; U.S. Br. 26). Accordingly, the employees (if any) of a Section 15(d) company may sue under Section 806.

What the headings and titles conspicuously do *not* say is that Section 806 covers employees of private companies. Rather, it provides "PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES." There is no principled way to read "the words that were actually included in that heading" (Pet. Br. 47 n.28) as encompassing employees of privately held companies like respondents.

B. Structure

1. Section 806 protects "an employee" against retaliation by two categories of actors: public companies and their representatives. The former are primarily liable and the latter are secondarily liable for retaliating against the public company's employees because of protected activity.[6]

As Chief Judge Easterbrook has explained, Congress's inclusion of contractors in Section 806 covers the situation where, for example, a company contracts with an "ax-wielding specialist" to deal with nettlesome employees. *Fleszar* v. *U.S. Dep't of La-*

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[6] When Congress wants to prohibit retaliation by two distinct sets of primary actors against their respective employees, it devotes a subsection to each so there is no confusion. *See, e.g.*, 12 U.S.C. § 1790b(a)(1) & (2) (cited in Pet. Br. 19). For this reason (and others), petitioners' invocation of non-SOX whistleblower provisions—which vary widely in wording, structure, coverage, and purpose—is misplaced. *See* Pet. Br. 19-20 n.15. For example, no appellate court has ever held that the whistleblower provisions of the AIR 21 Act, 49 U.S.C. § 42121, apply to contractors' employees. The argument that Section 806 should be "conformed" to AIR 21 (Pet. Br. 20; U.S. Br. 16-17; NELA Br. 11) is thus entirely circular. Importantly, AIR 21 does not create a private right of action; in Section 806, Congress cross-referenced AIR 21 solely for its rules of "Procedure" (18 U.S.C. § 1514A(b)), and its differently worded substantive provisions were *not* adopted into SOX.

bor, 598 F.3d 912, 915 (7th Cir.), *cert. denied*, 131 S. Ct. 423 (2010); *see also* Pet. App. 18a-19a n.11 (adopting similar analysis). This scenario was depicted in the 2009 movie "Up in the Air," in which George Clooney's character works for a private company "whose contracts are in corporate downsizing. In other words, they fire people." http://www.imdb.com/title/tt1193138/plotsummary.

Everyone agrees that Section 806 prohibits an "officer," such as Enron CEO Jeff Skilling, from retaliating against an Enron employee, like whistleblower Sherron Watkins; and that "an employee" does not include Skilling's own employee, such as a housekeeper or gardener. Pet. Br. 15 n.10; U.S. Br. 16. So if Skilling fired Watkins she could sue both Enron (as the public company employer) and Skilling (as an officer) under Section 806. Now, suppose Enron had contracted with Clooney to terminate or harass Watkins. Enron would remain primarily liable as the public company employer; while Clooney would be secondarily liable as a contractor. If Enron went bankrupt (as it did), Watkins could still pursue her claims for monetary relief against Skilling in the first scenario, and Clooney in the second. On the other hand, Section 806 no more speaks to Clooney's employees than to Skilling's; and thus does not cover petitioners.

Again petitioners unwittingly prove why they are wrong. "[S]tatutes that address the manner in which a company is to treat an 'employee,'" they say, "regulate how the firm deals with its own employees." Pet. Br. 16. Precisely so: Section 806 prohibits the public company employer from retaliating against its own employee, either directly or through a representative; and if this prohibition is violated, the public company employee may sue both the employer (as

the primary violator) and the representative (as a secondary actor). *That is how Section 806 works.*

2. Petitioners identify nothing in the statute that affirmatively states, or even hints, that employees of private companies may bring a civil action under Section 806. Instead, they argue that suits against contractors by public company employees would create anomalies with respect to prohibited acts, defenses, and remedies available. Pet. Br. 25-28, 35-39. Each of these arguments, however, would apply equally to suits against *officers* by public company employees; yet as explained above there is no textual or structural basis for distinguishing between the listed company representatives. These arguments also fail on their own terms.

a. Petitioners speculate whether and how a contractor could engage in "tangible" discrimination against a public company's employee. Pet. Br. 22-31. That effort is wasted since Section 806 is not limited to "tangible" discrimination. *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 786 (1998) (under Title VII, "discriminat[ion] ... with respect to ... terms, conditions, or privileges of employment ... is not limited to 'economic' or 'tangible' discrimination") (internal quotation marks omitted). Section 806 also prohibits "threatening" or "harassing" conduct. *Cf. Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 57 (2006) (Title VII's anti-retaliation provision prohibits employer's actions that could "dissuade a reasonable worker from making or supporting a charge of discrimination").

Indeed, petitioners eventually acknowledge that a contractor (such as Clooney's ax-wielding specialist) is prohibited from retaliating against a public company's employee. Pet. Br. 25; *id.* at 34 ("Surely

Congress did not intend to permit the contractor to retaliate" against "an employee of a public company"); U.S. Br. 12. Contrary to petitioners' assertion (Pet. Br. 25, 28), this situation is neither "highly atypical" nor "highly implausible." *See, e.g.*, *Tides* v. *Boeing Co.*, 644 F.3d 809, 811 (9th Cir.) ("Tides and Neumann repeatedly complained to management about the practice of giving the contractors managerial authority over Boeing employees"), *cert. denied*, 132 S. Ct. 518 (2011). And the statute as written accounts for it.

The government protests, however, that "the specialist would be an 'agent' of the public company—and an 'agent' is separately listed." U.S. Br. 15; *see also* Pet. Br. 26 ("the axe-wielding specialist would be personally liable ... [as] an 'agent' of a public company"). But not all contractors are agents; in fact, FMR's advisory agreements state that the investment adviser is an "independent contractor" and "shall not be an agent" of its clients, the mutual funds. J.A. 177. An ax-wielding specialist's contract obviously could include such a clause too.

Petitioners also suggest that "the public company would be liable for the acts of its authorized agent." Pet. Br. 26. But the public company might *not* be liable for actions of a non-agent contractor—for example, if the employer has no knowledge of the prohibited activity. More importantly, any liability (for acts of contractors *or* agents—or, for that matter, officers) would attach only if the public company remains solvent; if the public company goes under, as Enron did, the statute provides its employees a cause of action against secondary actors.

b. The affirmative defenses authorized by Congress accord with this scheme of primary and sec-

ondary liability. Relief is not available under Section 806 if "the employer" can demonstrate that it would have taken the same action even in the absence of the protected conduct. Pet. Br. 35 (citing 49 U.S.C. § 42121(b)). Petitioners argue that this defense "would make no sense" if a public company employee were to sue a contractor, because the contractor would be unable to assert the defense. *Ibid.* Yet there is no requirement, in law or logic, that every defense be available to every respondent. The public company as primary violator may assert this defense directly; secondary actors may invoke it, if at all, only derivatively. That is entirely sensible.

c. Nor is anything in the SOX remedial scheme inconsistent with making secondary actors liable for retaliating against public company employees. A public company employee prevailing in a Section 806 suit is "entitled to all relief necessary to make the employee whole," including reinstatement, back pay, and special damages. 18 U.S.C. § 1514A(c)(1). To be sure, the *reinstatement* remedy will usually run against only the public company employer (Pet. Br. 36); but of course, the public company will usually be a respondent. The secondary actors, including officers and contractors, may be held liable for *monetary* relief.

Petitioners' objection that there is "no reason to cover contractors" (Pet. Br. 30) ignores the historical context from which SOX arose. Section 806 allows whistleblowers to pursue money damages against the listed secondary actors. If the public company remains solvent, secondary actors represent an additional source of funds (or separate insurance policies) to satisfy a judgment. If the public company is in bankruptcy—as Enron was—the ability to sue the company representatives takes on special value. In

the wake of Enron, Congress knew that a reinstatement remedy could be worthless to employees of bankrupt companies. A monetary remedy against secondary actors could be the only remedy available.

3. By authorizing civil actions only by employees of public companies, Section 806 provides a bright line that can be administered by both Article I tribunals and Article III courts without tying up the system in extensive litigation—like this very case—about the scope of coverage.

Difficult coverage questions would arise if the Court were to accept petitioners' and the government's invitations to judicially amend Section 806 to extend to employees of public company representatives. As the district court recognized, allowing such suits would enlarge the private right of action beyond any conceivable congressional purpose. Pet. App. 111a. To avoid that absurd result, the district court articulated a "limiting principle" under which only employees who report securities fraud at their public company clients would be covered. *Id.* at 96a-123a.

Petitioners make no mention of the nebulous coverage questions that would arise under their proposed approach—which would extend Section 806 "to employees who had *no* relation whatsoever to the publicly traded company." *Brady* v. *Calyon Sec. (USA)*, 406 F. Supp. 2d 307, 318 (S.D.N.Y. 2005) (emphasis added). The government recognizes the problem; but its "solution" merely restates the issue: "Section 1514A applies not to all employees of all contractors of public companies, but only to those who have been retaliated against because they reported fraud against shareholders, violations of four federal anti-fraud laws, or violation of SEC rules and

regulations to certain people." U.S. Br. 23. Since the government also takes the position that Section 806 covers employee complaints untethered to shareholder fraud (*see Lockheed Martin Corp.* v. *ARB*, 717 F.3d 1121, 1130-32 (10th Cir. 2013)), its "built-in limitation[]" (U.S. Br. 23 (internal quotation marks omitted)) is thus no constraint at all.

Any meaningful limits tied to the objectives of Sarbanes-Oxley—protecting those who invest in public companies—would require satellite litigation just to figure out which individuals (or allegations of fraud) might proceed under Section 806. This Court rightly avoids creating such hazy standards that could seldom be resolved before trial. *See Vance* v. *Ball State Univ.*, 133 S. Ct. 2434, 2450 (2013) (adopting definition of "supervisor" that "can very often be resolved as a matter of law before trial"); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 742-43 (1975) (approving rule that "can normally be established by the defendant either on a motion to dismiss or on a motion for summary judgment").

Those problems do not arise in applying Section 806 as written, only to employees of public companies: The SEC maintains comprehensive lists of Section 12 registrants and Section 15(d) reporters. The coverage question can be resolved early, and easily, in the proceeding. This provides further structural evidence that Congress included only public company employees within the scope of Section 806.

C. History

Events before and after the passage of SOX confirm that Section 806 does not apply to employees of private companies.

1. The initial Senate Judiciary Committee report on what became Section 806 explained that

"[c]orporate employees who report fraud are subject to the patchwork and vagaries of current state laws, ... [such that] a whistleblowing employee in one state may be far more vulnerable to retaliation than a fellow employee in another state who takes the same actions." S. Rep. No. 107-146, at 10 (2002). Section 806 was therefore drafted to "provide whistleblower protection to *employees of publicly traded companies*." *Id.* at 13 (emphasis added).

The Senate report uses the phrase "employees of publicly traded companies" in discussing the whistleblower provision *six times*. S. Rep. No. 107-146, at 10, 13, 18, 19, 30. In sharp contrast, the Senate report makes no mention of employees of private companies, including investment advisers, or for that matter any contractors (other than accountants and lawyers, who are dealt with separately as explained below). Pet. App. 38a.

Senator Sarbanes, one of the legislation's coauthors, explicitly stated that it "*applies exclusively to public companies*" and that it was "*not applicable to pr[i]v[at]e companies, who make up the vast majority of companies across the country.*" 148 Cong. Rec. S7351 (daily ed. July 25, 2002) (emphasis added). As this Court has recognized, the sponsor's comments on intended limits of statutory coverage are "clearly probative of legislative judgment." *Simpson* v. *United States*, 435 U.S. 6, 13 (1978). Yet both petitioners and the government fail to mention this clear statement of legislative intent.

Unlike petitioners and their *amici*, Congress recognized the fundamental distinction between public and private companies. SOX "regulates public corporations, not privately-held companies ... [because] [b]y accepting money from private citizens, these

corporations bear a special responsibility to their investors and need to be held accountable." 148 Cong. Rec. H5474 (daily ed. July 25, 2002) (statement of Rep. Etheridge). Private companies do not access the capital markets and are not required to maintain the internal reporting systems required by SOX.

Moreover, it is simply unfathomable that Congress meant to authorize civil lawsuits by employees of *millions* of private companies "without a whisper of explanation." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 582 (1995). Had Congress contemplated that private companies could be subject to Section 806, it would have engendered debate, discussion, and dissension. *Gonzales* v. *Oregon*, 546 U.S. 243, 267 (2006); *see also FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147 (2000) ("Given the economic and political significance of the [issue] at the time, it is extremely unlikely that Congress could have intended to place [private employees] within the ambit of [the statute] absent any discussion of the matter"). The deafening silence of the legislative record on this question refutes any suggestion that Congress "intended" to cover employees of private companies. Congress does not "hide elephants in mouseholes." *Whitman*, 531 U.S. at 468.

Unable to unearth any historical evidence whatsoever that Congress intended the result they now advocate, petitioners and their *amici* fall back on anecdotes involving Enron. But the scenarios actually considered by Congress do not support the extension of Section 806 to employees of private companies.

The Senate report identified four examples of the "corporate code of silence" that preceded Enron's failure:

- Enron asked outside attorneys whether employee Sherron Watkins could be terminated after reporting accounting irregularities; an outside attorney responded that there was no state law prohibition in Texas.
- An Enron employee was fired for internal complaints about the improprieties of Enron's off-balance-sheet entities.
- A UBS Paine Webber financial advisor was fired for recommending to his clients not to purchase shares in Enron.
- An Arthur Andersen partner was removed from the Enron account for expressing reservations about the firm's practices.

S. Rep. No. 107-146, at 4-5; *see* Pet. Br. 58-59; U.S. Br. 20-22.

Contrary to petitioners' unsupported suggestion (Pet. Br. 59-60), each of these examples would be entirely unaffected by the Court's resolution of this case. The two Enron employees were employees of a public company, and thus are protected under everyone's reading of Section 806. UBS Paine Webber was also a public company, and the financial advisor engaged in no protected activity. Enron's outside lawyer did not retaliate against any employee. And the Arthur Andersen *partner* would likely not be protected as "an employee" even if Section 806 applied to private firms. *See, e.g., Clackamas Gastroenterology Assocs., P.C.* v. *Wells*, 538 U.S. 440, 449-50 (2003).

Moreover, SOX independently and directly addresses each example. Internal employees, like Sherron Watkins, are protected from retaliation for whistleblowing under Section 806. As explained further below, attorneys and accountants are subject to

detailed rules promulgated by the PCAOB and SEC, which include requirements for reporting allegations of unlawful activity. Importantly, Section 501 requires the SEC to adopt rules prohibiting retaliation against securities analysts who produce unfavorable research reports. SOX § 501, 15 U.S.C. § 78*o*-6(a). As this provision demonstrates, where Congress intended to protect employees of private companies from retaliation, it did so expressly; the corollary is that such persons are not covered by Section 806.

Undaunted, petitioners and the government argue that "outside professionals ... are most likely to uncover and comprehend evidence of potential wrongdoing." Pet. Br. 60 (internal quotation marks omitted); U.S. Br. 25 (internal quotation marks omitted). This is far too general a proposition on which to extend Section 806 beyond congressional contemplation to employees of millions of private companies. In any event, the Senate report on which they rely for this proposition reveals that Congress was actually concerned with the protection of corporate "*insiders*," not outside service providers. S. Rep. No. 107-146, at 10 (emphasis added); U.S. Br. 21-22. And that is precisely who Section 806 protects.

2. Legislative adjustments to Section 806 since SOX's enactment in 2002 confirm that petitioners, employees of privately held investment advisers and their affiliates, are not covered by this statutory provision.

a. In 2004, both houses of Congress considered—but declined to enact—a bill entitled the Mutual Fund Reform Act (MFRA), which, among other things, would have extended Section 806's coverage to employees of investment advisers and affiliates. *See* S. 2059, 108th Cong. § 116(b); H.R. 4505, 108th

Cong. § 107(b). This proposed legislation would have expressly achieved the expanded coverage both petitioners and the government now say that Congress enacted in 2002. *See Brown & Williamson*, 529 U.S. at 143-59 (relying on Congress's rejection of legislative proposals); *N. Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 534 (1982) (same).

Petitioners do not cite the MFRA, much less try to explain how their current position could possibly be reconciled with Congress's express decision not to extend Section 806 to investment advisers. In yet another unwitting concession, however, they observe that "if section [806] simply prohibited retaliation against an 'employee' by any mutual fund adviser, it assuredly would cover [respondents'] employees." Pet. Br. 18. Presumably so; but that hypothetical statute is the same as the MFRA, which Congress *rejected*.

For its part, the government argues that because the "record contains no statement of the sponsors' understanding of [the MFRA] or of § 1514A(a)," the "failed bill ... sheds no light on Section 1514A's reach at the time it was enacted." U.S. Br. 27 n.4 (internal quotation marks omitted). But if Section 806, as enacted, covered privately held investment advisers, why would the very next Congress take up legislation to extend Section 806 to investment advisers?

b. In 2010, the Dodd-Frank Act amended Section 806 to cover employees of non-public companies that are subsidiaries of public companies, as well as to employees of the major credit rating organizations (NRSROs). §§ 922(b), 929A, 124 Stat. at 1848, 1852. If Section 806 already covered every private company contracting with a public company, there would have been no need for Congress to extend Section 806 to

certain private companies. And the fact that Section 806 now covers *some* privately held contractors—the NRSROs—confirms that it does not cover others not mentioned—like respondents. *Expressio unius est exclusio alterius.*

Petitioners make no effort to reconcile their position with the Dodd-Frank amendments. *See* Pet. Br. 11 n.5. The government tries to downplay these amendments, baldly asserting that "not all NRSROs are contractors of public companies." U.S. Br. 30. But the SEC's own report shows that "[t]hree NRSROs ... accounted for approximately 97% of all outstanding credit ratings" and that these three *are* contractors to public company issuers. SEC, *Annual Report on NRSROs* 11 & n.25 (Mar. 2012). And as the government recognizes, some 70% of NRSROs are privately held. U.S. Br. 30 n.5.

As the sponsor of these amendments explained, "[t]he whistleblower provisions of the Sarbanes-Oxley Act protect employees of the publicly traded companies" and Dodd-Frank "expands the provision to include employees of the rating companies." 156 Cong. Rec. S3349 (daily ed. May 6, 2010) (statement of Sen. Cardin). To accept petitioners' and the government's position in this case, the Court would have to conclude that this was a pointless act of legislation. *See* Pet. App. 43a-46a.

The continued legislative adjustments in the decade following SOX show that Congress did not address the problems facing all corporate whistleblowers in one fell swoop. In light of the MFRA (which failed) and Dodd-Frank (which passed), judicially amending Section 806 in the manner that petitioners and the government now suggest would "un-

dermine Congress' determination" of its appropriate scope. *Stoneridge*, 552 U.S. at 162-63.

D. Purpose

The Sarbanes-Oxley Act seeks to prevent future Enrons "by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws." 116 Stat. at 745. *Private companies are not required to make such disclosures.* This basic principle of federal securities regulation demolishes the argument that judicially extending Section 806 to employees of private companies would further the "purposes" of SOX. Yet petitioners and their *amici* nowhere address it.

1. "No legislation pursues its purpose at all costs." *Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (internal quotation marks and alteration omitted). "Congress may be unanimous in its intent to stamp out some vague social or economic evil" but the final language of the legislation reflects hard-fought compromise on the best means for effectuating that intent. *Bd. of Governors of Fed. Reserve Sys.* v. *Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986) ("[a]pplication of 'broad purposes' of legislation at the expense of specific provision ignores the complexity of the problems that Congress is called upon to address and the dynamics of legislative action").

Of the more than 6 million employer firms in the U.S. in 2007, just 4,584 were listed on a U.S. stock exchange. Mary Ellen Biery, *Public Companies Out-Invested by Private Firms*, Forbes (Sept. 21, 2012), http://www.forbes.com/sites/sageworks/2012/09/21/private-companies-invest-more-than-publicly-traded-firms. In other words, 99% of U.S. firms are privately held, and those privately held companies account

for more than 67% of non-government employment. *Ibid.* Many private companies have contracts or subcontracts of some sort with public companies, and thus would potentially be subject to liability on petitioners' reading.

The 2002 Congress, in enacting SOX, clearly made the new civil cause of action available to whistleblowing employees of the relatively few, and generally large, companies that have elected to access the capital markets and subject themselves to the securities laws—the same companies, not coincidentally, on whom Congress simultaneously imposed new internal reporting requirements. Congress did not, however, also authorize such lawsuits by the employees of millions of additional private companies that were not covered by SOX's reporting and other regulatory provisions.

"The choice between the costs" of too much and too little regulation "properly lies with the legislature." Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 552 (1983). The requirement of congressional authorization "reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violation of statutes." *Wilder* v. *Va. Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990); *see also Alexander* v. *Sandoval*, 532 U.S. 275, 286-87 (2001). In addition, "[t]he determination of who can seek a remedy has significant consequences for the reach of federal power." *Stoneridge*, 552 U.S. at 165. Expansive construction of federal causes of action creates a "risk that the federal power would be used to invite litigation ... in areas already governed by functioning and effective state-law guarantees." *Id.* at 161.

Just recently, for example, this Court rejected a plea for judicial expansion of the Torture Victims Protection Act. *Mohamad* v. *Palestinian Authority*, 132 S. Ct. 1702, 1710 (2012). The Court concluded that whether or not it would be good policy to extend the Act, "petitioners' purposive argument simply cannot overcome the force of the plain text." *Ibid.* Where "Congress has seen fit to proceed in more modest steps in the Act," this Court held, "it is not the province of this Branch to do otherwise." *Id.* at 1710-11; *see also, e.g.*, *Pegram* v. *Herdrich*, 530 U.S. 211, 232-33, 237 (2000); *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 263 (1993); *Associated Gen. Contractors of Cal., Inc.*, v. *Cal. State Council of Carpenters*, 459 U.S. 519, 530 (1983); *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 535-36 (1975).

Concerns over judicial expansion of remedies are particularly acute in the securities context. Securities fraud litigation "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 80 (2006) (internal quotation marks omitted). This Court repeatedly has refused to expose a new class of defendants to securities litigation where Congress has refused to do so. *See Janus*, 131 S. Ct. at 2303; *Morrison* v. *Nat'l Austl. Bank*, 130 S. Ct. 2869, 2888 (2010); *Stoneridge*, 552 U.S. at 153; *Central Bank*, 511 U.S. at 191-92; *Blue Chip Stamps*, 421 U.S. at 732-33.

SOX whistleblower claims, which are akin to a securities fraud claim wrapped inside a retaliation claim, compound the complexities of both areas of law and therefore present a particularly burdensome and expensive form of civil litigation. Many if not most private companies will lack the internal sys-

tems necessary for receiving or processing whistleblower complaints, the authority necessary to investigate or terminate purported misconduct at public companies, and the knowledge of securities regulation necessary to independently assess the reasonableness of any such allegations. Therefore, while they could choose to blindly accuse their clients of committing fraud or go to the authorities with a similar accusation, they might also quite reasonably choose to do nothing. Nonetheless, they could be subject to expensive litigation by disgruntled employees who later lose their jobs for completely unrelated reasons.

As this Court recognized just last Term, retaliation claims are on the rise, and have significant potential for abuse. *Nassar*, 133 S. Ct. at 2531. Reflexively allowing more such claims would thus make for bad public policy in this context.

2. Section 806 is a single provision in a complex and reticulated overhaul of the regulatory system for public companies and certain service providers, and its scope must be viewed in light of the role it plays within that legislative scheme. *Brown & Williamson*, 529 U.S. at 132-33. In addition to whistleblower protection, Congress adopted discrete tools to prevent recurrence of specific aspects of the Enron scandal.

Congress was concerned that outside accountants and lawyers, who should have been "'acting as gatekeepers who detect and deter fraud,'" were instead complicit in Enron's wrongdoing. Pet. Br. 56 (quoting S. Rep. No. 107-146, at 20-21). To address this concern, SOX *directly* regulates accountants and lawyers. It establishes the *Public Company* Accounting Oversight Board, which "regulates *every detail* of

an accounting firm's practice, including hiring and professional development, promotion, supervision of audit work, the acceptance of new business and the continuation of old, internal inspection procedures, professional ethics rules, and 'such other requirements as the Board may prescribe.'" *Free Enter. Fund* v. *PCAOB*, 130 S. Ct. 3138, 3148 (2010) (emphasis added). And it requires the SEC to establish similar rules of professional conduct for attorneys appearing and practicing before it. SOX § 307, 15 U.S.C. § 7245.

SOX makes each of these gatekeepers effectively a "whistleblower by statute." Outside accountants and lawyers of public companies are subject to affirmative obligations to investigate and report misconduct at public companies. SOX § 105, 15 U.S.C. § 7215(c)(4) (increasing penalties for auditors who fail to report suspected fraud to the issuer and, in some circumstances, to the SEC under Section 10A of the Securities Exchange Act, 15 U.S.C. § 78j-1); SOX § 307, 15 U.S.C. § 7245 (requiring the SEC to issue similar reporting requirements for outside lawyers). Under these provisions, a law firm or public accounting firm that engages in retaliation against such whistleblowing can be banned from further practice before the SEC. *See* SOX §§ 105, 602, 15 U.S.C. §§ 7215(c)(4)(A)-(B), 78d-3(a). Imposition of this penalty functionally puts licensed professionals out of business, a far more potent deterrent than the civil action provided to public company employees in Section 806.

Moreover, the specific problems identified by Congress were addressed by specific SOX provisions. For example, Congress was concerned that Arthur Andersen "'was simultaneously serving as both consultant and 'independent' auditor for Enron.'" Pet.

Br. 55 (quoting S. Rep. No. 107-146, at 3). That concern was addressed by provisions requiring increased auditor independence. SOX §§ 201-203, 15 U.S.C. § 78j-1(g)-(j). To address the concern that "employees from Andersen were allegedly shredding 'tons' of documents" while "Andersen's lawyers issued ambiguous advice encouraging such document destruction" (Pet. Br. 55 (quoting S. Rep. No. 107-146, at 4)), Section 802 makes it a crime to shred or otherwise alter documents "with the intent to impede, obstruct, or influence" a federal investigation, and requires accountants to "maintain all audit or review workpapers for a period of 5 years." SOX § 802, 18 U.S.C. §§ 1519-20.

Petitioners' myopic focus on Section 806 does not account for these and other SOX provisions. For example, they assert that "[u]nder the First Circuit's narrow reading of section 1514A, ... it would have been legal for Arthur Andersen to fire any employee who answered questions from the SEC." Pet. Br. 10. But Section 1107—which petitioners do not cite—makes it a criminal offense for *anyone* to retaliate against any person who provides information to the SEC and other federal law enforcement officers. SOX § 1107, 18 U.S.C. §§ 1513(e), 1515(a)(4). Congress's decision to use more limited language in authorizing civil lawsuits under Section 806 must be respected. *See Nassar*, 133 S. Ct. at 2528-31; *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 452 (2002).

3. Ultimately, petitioners' and the government's policy argument boils down to the contention that *all* whistleblowers should be protected, so SOX must protect them. *See* Pet. Br. 10, 22, 28-30, 34, 47, 50, 53, 61; U.S. Br. 28. This proposition is hardly self-evident; whistleblower protection is a relatively new phenomenon at the federal level and Congress works

both deliberately and incrementally. Moreover, this simplistic "catch-all" approach ignores numerous other legal protections for whistleblowers.

a. Dodd-Frank created a separate regime of whistleblower protection for employees who report allegations of misconduct to the SEC. Section 922 of Dodd-Frank creates a private cause of action for individuals who are discharged or discriminated against by their employers for providing information to the SEC relating to a potential violation of the securities laws. 15 U.S.C. § 78u-6. Unlike Section 806, Section 922 is broadly worded to cover *all* employers who retaliate against a whistleblower, and thus covers private companies (including investment advisers) who retaliate against their own employees.

Petitioners reported their allegations to the SEC, which declined to open an investigation or enforcement action (further underscoring the baselessness of their contentions). Accordingly, but for the date of enactment, petitioners could have proceeded under Section 922 of Dodd-Frank. *See Asadi* v. *G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 623 (5th Cir. 2013). Yet, petitioners make no attempt to reconcile the scope of Dodd-Frank Section 922 with their overbroad interpretation of SOX Section 806.

The government suggests that employees of private contractors must be covered under both provisions because "Section 922 focuses on encouraging reporting to federal authorities, whereas Section [806] covers both internal and external reporting." U.S. Br. 30. But the distinction between internal and external reporting actually points up the different scope of the two whistleblower protection regimes. Public companies, which have voluntarily subjected themselves to securities regulation, are re-

quired to have structures for internal reporting under SOX; their employees may use those structures and may bring a civil action under Section 806. Private companies, in contrast, are not required to have those internal reporting structures; Section 806 does not cover their employees. Meanwhile, employees of all companies, public or private, may report allegations of securities fraud to the SEC, which is equipped to evaluate such reports, and receive protection under Dodd-Frank Section 922.

There is no justification for stretching the statutory bounds of Section 806 to cover conduct that falls within the express ambit of Dodd-Frank's remedial scheme for whistleblowers. Any "gap" that might, *arguendo*, have existed for employees of private entities between 2002 and 2010 has now been closed.

b. In addition to federal anti-retaliation laws, there are numerous state laws that protect whistleblowers. *See* National Conference of State Legislatures, State Whistleblowers Laws (Nov. 2010), http://www.ncsl.org/issues-research/labor/state-whistleblower-laws.aspx. Many states also recognize the common-law tort of wrongful discharge in violation of public policy. *See, e.g., Jie* v. *Liang Tai Knitwear Co.*, 89 Cal. App. 4th 654, 661-62 (2001).

c. Mutual funds and their investment advisers are separately and comprehensively regulated under the two 1940 Acts, which subject participants in the mutual fund industry to significant procedural and substantive controls to address concerns about the "potential for abuse inherent in the structure of investment companies." *Jones*, 559 U.S. at 339 (internal quotation marks omitted). Congress is well aware of the unique issues arising in the mutual fund arena and has frequently enacted or amended

legislation directed specifically at investment advisers. *See id.* at 339-41 (discussing amendments to the 1940 Acts). The fact that SOX amended the 1940 Acts in other respects is powerful evidence that Congress did not *sub silentio* include privately held investment advisers in Section 806. The failure of the MFRA, which would have done so expressly, just two years later confirms that privately held investment advisers and their affiliates are *not* covered by Section 806.

Petitioners and the government point out that mutual funds often have no employees of their own. Pet. Br. 39-40; U.S. Br. 25-26. But this is merely a consequence of the corporate structure approved (and in many respects required) by Congress in the 1940 Acts—it predates SOX by more than half a century, and has nothing to do with whistleblower protection or the avoidance of liability. In all events, there is no "mutual fund exception" to ordinary principles of securities law and statutory construction. *Janus*, 131 S. Ct. at 2304.

* * *

The private right of action created by Section 806 is for employees of public companies. It does not cover employees of every mom-and-pop shop, partnership, and privately held entity in America that does business with a public company. Adherence to the text, structure, history, and purpose of the statute requires affirmance of the decision below.

II. The Administrative Review Board's Construction Of Statutory Terms Is Entitled To No Deference

The DOL's Administrative Review Board did not render a decision in either petitioner's case. Nonetheless, petitioners and the government now argue that this Court should "defer" to an interlocutory decision in a different case in which the ARB disagreed with the First Circuit on the purely legal question of how to construe the term "an employee" in Section 806. *Spinner* v. *David Landau & Assocs., LLC*, 2012 WL 2073374 (DOL ARB May 31, 2012); *see* Pet. Br. 61-63; U.S. Br. 9-11, 31-34.

Far from a routine invocation of *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), the government's bid for deference in this case is one of the most sweeping power-grabs in the annals of administrative law. This Court has concluded that agency adjudication is a permissible mode of policymaking *only* where the agency also has been delegated "the power to make law or policy by other means." *Martin* v. *OSHRC*, 499 U.S. 144, 154 (1991). Since Congress gave DOL no policymaking role under SOX, the ARB's decisions receive no deference. Petitioners and the government cite no case in which this Court has deferred to an adjudicative decision made by a tribunal within an agency that lacks policymaking authority, and we are aware of none. The Court should not break new ground here.

1. The ARB has *not* determined that Section 806 covers either petitioner. That is because they each elected to bypass the ARB and proceed directly to federal court for a *de novo* determination of their respective complaints. Indeed, in the only administrative ruling on the complaints filed by petitioners with

DOL, an ALJ dismissed Zang's case on the ground that he was *not* a covered employee under Section 806. J.A. 172-98. Having forgone ARB review in favor of *de novo* proceedings in federal court, petitioners should not now be heard to contend that an ARB decision in a different case has any bearing on the proper construction of Section 806 here.

Moreover, the question whether ARB constructions of statutory terms receive *Chevron* deference was neither presented to nor passed upon by the courts below in this case. *See* Pet. App. 50a. This is reason enough for this Court not to reach that question here. *See Nat'l Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999). And the argument is fully developed only in an *amicus* brief, another reason to leave it for another day. *See United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981).

2. If the Court were to reach the question, it should hold that the ARB receives no deference in construing SOX's terms.[7]

a. The statute is clear—"an employee" in Section 806 means an employee of the public companies that are directly regulated by SOX. Where a "court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron,* 467 U.S. at 843 n.9; *see also Brown & Williamson*, 529 U.S. at 132

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[7] The lower court decisions affording deference to ARB decisions contain no meaningful analysis. *See Lockheed*, 717 F.3d at 1131; *Wiest* v. *Lynch*, 710 F.3d 121, 131 (3d Cir. 2013); *Welch* v. *Chao*, 536 F.3d 269, 276 & n.2 (4th Cir. 2008) (*Chevron* deference uncontested). For example, none so much as cited *Martin*.

("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context"). No agency action may override the expressed intent of Congress. *See City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1868 (2013) ("'If the intent of Congress is clear, that is the end of the matter'"). This pure question of statutory interpretation does not call for any kind of administrative expertise or judgment.

The word "employee" is not an implicit delegation to bureaucrats within DOL to determine how much of the American economy should be subjected to a new and burdensome form of civil litigation. *See Brown & Williamson*, 529 U.S. at 160 ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion"). "'The implausibility of Congress's leaving a highly significant issue unaddressed (and thus 'delegating' its resolution to the administering agency) is assuredly one of the factors to be considered in determining whether there is ambiguity.'" *Whitman*, 531 U.S. at 468-69 (citation omitted).

The ARB's decision in *Spinner* is irreconcilable with the text, structure, history, and purpose of Section 806. As this Court has explained, courts "must reject administrative constructions of the statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981). That describes *Spinner* to a tee.

b. Even if the statutory phrase "an employee" were ambiguous (as the government inconstantly ar-

gues), the ARB's construction of that language would get no deference.

DOL may exercise only the regulatory authority conferred upon it by Congress. *City of Arlington*, 133 S. Ct. at 1869 ("Both [agencies'] power to act and how they are to act is authoritatively prescribed by Congress"). SOX confers exceedingly limited responsibilities on DOL. One provision has nothing to do with this case: The SEC must "consult[]" with the Secretary of Labor before issuing rules regarding insider trading. SOX § 306, 15 U.S.C. § 7244(a)(3). The only other SOX provision to even mention DOL is Section 806.

Section 806 tasks the Secretary of Labor with investigating and adjudicating whistleblower complaints. *See* 18 U.S.C. § 1514A. The Secretary, in turn, has delegated investigatory authority to the Occupational Safety and Health Administration (OSHA) and adjudicatory authority to the ARB. Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). OSHA conducts an investigation and makes an initial decision. 18 U.S.C. § 1514A(b)(2)(A); 49 U.S.C. § 42121(b)(2)(A). Either the complaining employee or the employer may seek *de novo* review of OSHA's initial decision before a DOL ALJ (29 C.F.R. §§ 1980.106, 1980.107), discretionary review of the ALJ's decision by the ARB (29 C.F.R. § 1980.110), and review of the agency's final decision in a federal court of appeals (49 U.S.C. § 42121(b)(4)(A); 29 C.F.R. § 1980.112(a)).

Nothing in this regime authorizes the Secretary of Labor or his designees to play a policymaking role. But *Chevron* deference is founded on the premise that Congress "committed to the agency's care by the statute" the choice between "conflicting *policies*."

467 U.S. at 845 (emphasis added, internal quotation omitted). For that reason, and others, courts owe no deference to ARB determinations.

c. The government suggests that formal agency adjudications are entitled to deference as a matter of course. U.S. Br. 10-11. That is incorrect. "[F]or *Chevron* deference to apply," this Court has explained, "the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted." *City of Arlington*, 133 S. Ct. at 1874; *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001) (courts must decide whether "the agency's generally conferred authority and other statutory circumstances" make it apparent "that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute").

In *every case* cited for the proposition that agency adjudications receive deference (Pet. Br. 61; U.S. Br. 10), the relevant agency possessed rulemaking or other express authority to interpret the statute in issue. *See SEC* v. *Zandford*, 535 U.S. 813, 820 (2002); *Mead*, 533 U.S. at 230 n.12 (collecting cases). As these cases illustrate, where Congress has conferred interpretive power on an agency, the agency may elect to exercise that power through adjudication rather than notice-and-comment rulemaking. *See SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947).

The necessary corollary is that where the agency has no interpretive authority, neither do its adjudicatory tribunals. On this point, *Martin* is instructive if not dispositive. The Court explained that "agency adjudication is a generally permissible mode of lawmaking and policymaking *only* because the unitary agencies in question also had been delegated the

power to make law and policy through rulemaking." 499 U.S. at 154 (emphasis added). "Insofar as Congress did not invest the [Occupational Safety and Health Review] Commission with the power to make law or policy by other means," the Court could not "infer that Congress expected the Commission to use *its* adjudicatory power to play a policymaking role." *Ibid.* The *Martin* Court therefore concluded that "Congress intended to delegate to the Commission the type of nonpolicymaking adjudicatory powers typically exercised by a *court* in the agency-review context." *Ibid.* Under those circumstances, the "Commission need be viewed as possessing no more power than this in order to perform its statutory role as 'neutral arbiter.'" *Id.* at 155.

To our knowledge, this Court has never deferred to an adjudicative decision made by a tribunal within an agency that lacks policymaking authority. Rather than a routine case of deferring to agency adjudication, as the government pretends, giving deference to ARB decisions would break new and dangerous ground, and would allow agencies to claim deference even where Congress has withheld policymaking authority. This would raise substantial constitutional questions—under both the separation of powers and Article III—which are avoided by following *Martin*, the closest precedent. *See Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). Yet neither petitioners nor the government address *Martin*.

d. The government begins its brief with the assertion that DOL "is charged with interpreting" Section 806. U.S. Br. 1. That is false: Congress delegated *no* substantive rulemaking authority to DOL, as the agency itself conceded in the court below. *See* Pet. App. 47a, 49a; C.A. DOL Amicus at 18 n.8. Alt-

hough the government tries to dance a fine line (U.S. Br. 33 n.8), DOL also conceded in the court below that its *procedural* regulations were not authoritative interpretations of the Act; "admit[ted]" that those procedural regulations were "entitled to no deference" under *Chevron*; and made no claim to deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). *See* C.A. DOL Amicus at 18 n.8; Pet. App. 47a, 49a.

DOL's sole function is to investigate and adjudicate complaints. As the government elsewhere concedes, Congress only "granted the Secretary of Labor the authority to *enforce* Section 1514A through administrative adjudication." U.S. Br. 3 (emphasis added); *see also id.* at 6, 10. DOL has no expertise regarding the securities laws, public companies, or the mutual fund industry. Like the Commission in *Martin*, DOL arbiters—the ALJs and the ARB—perform a decisional function, not a policymaking one. If this Court were to defer to the ARB's legal interpretations in this context, then it would be allowing an arrogation of policymaking authority that Congress manifestly did not grant.

The judiciary's role in adjudicating Section 806 complaints also saps any rationale for deferring to the ARB. Although an employee must file an administrative complaint with OSHA, agency adjudication is usually not mandatory. 18 U.S.C. § 1514A(b)(1)(B); *Day* v. *Staples, Inc.*, 555 F.3d 42, 52-53 & n.5 (1st Cir. 2009). If "the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant," the complaining employee may file a *de novo* action in federal district court. 18 U.S.C. § 1514A(b)(1)(B).

Accordingly, an Article III court will be called upon to interpret Section 806 in the first instance in most cases, since complainants—like both petitioners here—will frequently exercise their option to bypass the agency and proceed in federal district court. This is a clear indication that federal courts have independent authority to interpret the judicially enforceable remedy without deference to the ARB's interpretations. *See Mead*, 533 U.S. at 232. In other words, Congress's specification of *de novo* proceedings in federal court is an express opt-out of the *Chevron* regime. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517 (describing *Chevron* as "a background rule of law against which Congress can legislate").[8]

3. No party or *amicus* has requested that the ARB's decision in *Spinner* be given *Skidmore* deference, and for good reason. The weight afforded an agency interpretation under *Skidmore* turns on the "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Skidmore*, 323 U.S. at 140; *Nassar*, 133 S. Ct. at 2533; *Vance*, 133

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[8] Even where the ARB does make a decision, it is not final: The aggrieved party may challenge the ruling in a federal court of appeals—a judicial check on the administrative process that has not yet occurred in *Spinner*. Moreover, Congress authorized only the "Secretary of Labor"—an Officer of the United States who holds political accountability for the Department's decisions—to make final adjudications under Section 806. There is no indication that the Secretary has adopted the interlocutory *Spinner* decision; and therefore it is not a statement of agency position entitled to deference. David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 204; *see also* Scalia, *supra*, at 519.

S. Ct. at 2443 n.4. The ARB's counter-textual construction of Section 806, which is neither consistent nor reasonable, is entitled to no deference.

a. The ARB in *Spinner* did not employ the tools of statutory construction as instructed by this Court, instead viewing itself as "obliged" to "interpret Section 806 broadly both because it is a remedial statute and the legislative history encourage[d] [it] to do so." Pet. App. 166a. *But see, e.g., Pinter* v. *Dahl*, 486 U.S. 622, 653 (1988) ("broad remedial goals" of a statute are insufficient justification "for interpreting a specific provision more broadly than its language and the statutory scheme reasonably permit") (internal quotation marks omitted). *Spinner*'s methodological error led to an erroneous conclusion.

The ARB also considered itself "obliged to follow" DOL's procedural regulations in *Spinner*. Pet. App. 142a & n.6 (citing 75 Fed. Reg. 3,925 (Jan. 15, 2010)); *see also id.* at 153a ("the ARB is bound by the DOL regulations"). Those rules, however, expressly state that they are "*not intended to provide interpretations of the Act.*" 69 Fed. Reg. 52,104, 52,105 (Aug. 24, 2004) (emphasis added). Before the court of appeals, the Secretary "admit[ted]" that these procedural regulations were "entitled to no deference" under *Chevron*, and (contrary to the government's unsupported assertion to this Court, *see* U.S. Br. 33 n.8) did not claim deference under *Skidmore*. *See* Pet. App. 47a, 49a; C.A. DOL Amicus at ii-iv.

Indeed, the "starting point" of the ARB's analysis in *Spinner* was "*the implementing regulations construing the relevant statutory text.*" Pet. App. 148a (emphasis added); *see also id.* 142a, 149a, 153a. The ARB decision can get no more deference than the

procedural regulations on which it was premised—the ARB cannot spin straw into gold.

Furthermore, the *post hoc* nature of *Spinner*, as applied to this case, undermines its legitimacy. The ARB's decision was issued in direct response to the First Circuit's decision in this case, not as a neutral explanation of the applicability of Section 806 to private company employees. It should go without saying that administrative tribunals do not sit to review decisions of the federal courts of appeals in this fashion. The ARB's decision in *Spinner* simply adopts the position advanced, unsuccessfully, by DOL in its *amicus* brief in the First Circuit. As a "'convenient litigating position'" to shore up the government's case here after it lost in court (*Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (citation omitted)), *Spinner* is due no more deference than the government's *amicus* brief.[9]

b. *Spinner* conflicts with every extant decision on the question presented by an Article III court. *See* Pet. App. 17a; *Fleszar*, 598 F.3d at 915 (rejecting argument that a non-public company may be covered by Section 806 because it once contracted with a mutual fund broker-dealer); *Ervin* v. *Nashville Peace & Justice Ctr.*, 2008 WL 4449920, at *7 (M.D. Tenn. Sept. 29, 2008) ("by its very terms, Section 806 ap-

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[9] The First Circuit correctly concluded it "owe[d] no deference" to DOL's *amicus* brief. Pet. App. 51a; *see also Christopher*, 132 S. Ct. at 2168-70 (according no deference to a DOL amicus brief); *Janus*, 131 S. Ct. at 2303-05 & n.8 (no deference due to SEC's views on scope of private right of action). Neither petitioners nor the government contest that holding, and the government does not even ask for deference to the *amicus* brief it filed in this Court. *See Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988).

plies only to employees of publicly traded companies"); *Tumban* v. *Biomérieux, Inc.*, 2007 WL 778426, at *2 (M.D.N.C. Mar. 13, 2007) ("The Sarbanes-Oxley Act only applies to publicly traded companies"). As one court correctly explained: "Nothing in the Act suggests that it is intended to provide general whistle-blower protection" to employees of "any privately-held employer, such as a local realtor or law firm, that has ever had occasion, in the normal course of its business, to act as an agent of a publicly traded company, even as to employees who had no relation whatsoever to the publicly traded company." *Brady*, 406 F. Supp. at 318.

Moreover, before *Spinner*, the ARB and ALJs within DOL had held that Section 806 did *not* apply to private contractors and subcontractors of public companies. *Fleszar* v. *Am. Med. Ass'n*, 2009 WL 891347, at *3-4 (DOL ARB Mar. 31, 2009), *aff'd*, 598 F.3d 912; *Field* v. *BKD, LLP*, 2011 WL 2165860, at *3 (DOL ARB May 27, 2011). Indeed, as noted above, the ALJ *in this case* dismissed petitioner Zang's complaint on the ground that he was not a covered employee under Section 806. J.A. 198. That is the only administrative decision actually in the record of this case, yet no one proposes deferring to it.

Only *after* the First Circuit issued its decision in *this* case did the ARB change direction in *Spinner*. But neither *Spinner* nor the government's brief acknowledges—much less explains—the departure from DOL's own previous decisions on the same subject. "[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position." *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). Instead of providing the re-

quired "'reasoned analysis'" for its change in position (*id.* at 1810), the ARB's decision in *Spinner* arbitrarily ignored that contrary administrative authority. *See* Pet. App. 143a.

In light of the ARB's about-face, applying *Spinner* here based on conduct that occurred well before that interpretation was announced would create "precisely the kind of 'unfair surprise'" against which this Court's cases have long warned. *Christopher*, 132 S. Ct. at 2167. It would be particularly startling to defer to the ARB's construction in a different adjudication (to which respondents were not parties) when the lack of an ARB decision on petitioners' complaints is the direct result of petitioners' own elections to proceed in federal district court. The absence of fair warning provides another compelling reason to reject the government's attempt to arrogate to the ARB interpretive authority that is reserved to the courts.

* * *

Section 806 authorizes an employee of a public company to bring a civil action against the employer and designated representatives for retaliation. The role of this Court is not to rewrite the law, much less allow unaccountable administrators to do so. Because petitioners were employed by private companies, the court below correctly directed dismissal of their complaints.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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REPLY BRIEF

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JACKIE HOSANG LAWSON and JONATHAN M. ZANG,

Petitioners,

v.

FMR LLC, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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TABLE OF CONTENTS

		Page
I.	The Text Of Section 1514A Does Not Support FMR's Narrow Interpretation	2
II.	Respondents' Interpretation Would Render Meaningless The Statutory Prohibition Against Retaliation By Contractors And Subcontractors	6
III.	The Legislative History Of Section 1514A Does Not Support Respondents' Narrow Interpretation	9
IV.	Respondents' Narrow Interpretation Is Inconsistent With The Intent Of Congress To Insure The Accuracy Of Mutual Fund Disclosures	12
V.	Respondents' Narrow Definition Is Inconsistent With Other Provisions Of The Sarbanes-Oxley Act	14
VI.	Protecting Employees Of Contractors And Subcontractors Would Not Dramatically Expand The Statute's Scope	15
VII.	The Administrative Review Board's Decision In *Spinner* Is Entitled To *Chevron* Deference	18
CONCLUSION		27

TABLE OF AUTHORITIES

Page

CASES

Asadi v. G.E. Energy, 720 F.3d 620 (5th Cir.2013) 18

Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984) ..... *passim*

Clackamas Gastroenterology Associates, P.C. v. Wells, 538 U.S. 440 (2003) 2, 9

Connecticut Light & Power Co. v. Secretary of the Department of Labor, 85 F.3d 89 (2d Cir.1996) 19

Coupar v. United States Dep't of Labor, 105 F.3d 1263 (9th Cir.1997) 19

Field v. BKD, LLP, 2011 WL 2165860 (DOL ARB May 27, 2011) 22

Fleszar v. Am. Med. Ass'n, 2009 WL 891347 (DOL ARB Mar. 31, 1999) 22

INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) 22

Martin v. OSHRC, 499 U.S. 144 (1991) 20, 21

Murray v. UBS Securities, LLC, 2013 WL 2190084 (S.D.N.Y. May 21, 2013) 18

SEC v. Zandford, 535 U.S. 813 (2002) 22

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 24

Spinner v. David Landau & Assocs., LLC, 2012 WL 2073374 (DOL ARB May 31, 2012) ..... *passim*

Tides v. Boeing Co., 644 F.3d 809 (9th Cir.), *cert. denied*, 132 S.Ct. 518 (2011) 8

TABLE OF AUTHORITIES – Continued

Page

United States v. Craft, 535 U.S. 274 (2002) 12

United States v. Mead Corp., 533 U.S. 218 (2001) 18, 19, 20, 21

Yellow Transportation, Inc. v. Michigan, 537 U.S. 36 (2002) 20

STATUTES

116 Stat. 745 (2002) 13

124 Stat. 1376 (2010) 12

15 U.S.C. §78d-3(a) 14

15 U.S.C. §78j-1(m)(4)(A) 15

15 U.S.C. §78u-6(h)(1)(A)(i)-(iii) 17

15 U.S.C. §7215(c)(4)(A)-(B) 14

18 U.S.C. §1514A ..... *passim*

18 U.S.C. §1514A(a) 2, 5

18 U.S.C. §1514A(b)(1)(A) 23

Sarbanes-Oxley Act ..... *passim*

Dodd-Frank Act 12, 17

OTHER AUTHORITIES

76 Fed. Reg. 34300 (June 13, 2011) 18

148 Cong.Rec. S1788 (March 12, 2002) 10

Restatement (Second) of Agency, §220(1) (1957) 2

S. 2010, 107th Cong., 2002 11

TABLE OF AUTHORITIES – Continued

Page

S.Rep. No. 107-146 (2002) 10

Secretary's Order 02-2012, 77 Fed. Reg. 69378, 69379 (Nov. 16, 2002) 19

Although the Sarbanes-Oxley Act was adopted in response to the collapse of Enron, respondents' interpretation has the inexplicable consequence of leaving outside the scope of section 1514A accountants at Arthur Andersen, whose deep involvement in Enron's machinations was central to the entire scheme. That interpretation also denies whistleblower protection to employees of entities such as Chewco, Jedi, and JLM, that Enron created for the express purpose of hiding its precarious economic position. And although the text of section 1514A expressly applies to mutual funds, respondents' narrow interpretation would often deny protection to the only employees who would understand problems in mutual funds' public disclosure statements. The language of the statute does not support these implausible results.

Section 1514A expressly applies to contractors or subcontractors of a public company. The dispute in this case is not about which firms are covered, but about what actions those firms are forbidden to take. Respondents defend their narrow interpretation as necessary to assure that not too many contractors will be under any legal obligations. But their interpretation is so narrow that it would render meaningless the language of section 1514A prohibiting retaliation by contractors and subcontractors.

I. THE TEXT OF SECTION 1514A DOES NOT SUPPORT FMR'S NARROW INTERPRETATION

When a statute forbids an entity to retaliate against an "employee," the normal meaning of that prohibition is to bar retaliation against the entity's own employees.[1] Nothing in section 1514A warrants departure from that ordinary meaning.

(1) Respondents assert that section 1514A(a) "defines 'employee' to mean 'employee ... of such company.'" (R.Br. 6; see R.Br. 17). That is not correct. No provision of section 1514A defines "employee"; indeed, the section has no definitions at all.

"Employee" in section 1514A has the ordinary meaning of that term, "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 448 (2003) (quoting Restatement (Second) of Agency, §220(1) (1957)). "Employee" has the same meaning throughout section 1514A, although in several instances is subject to varying limiting language.

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[1] Respondents argue that the prohibition in section 1514A is similar to the admonition "no homeowner, or guest or visitor of such homeowner, shall be rude to a neighbor." (R.Br. 16). But in respondents' example, the "guest or visitor" is physically in the homeowner's house, and thus would be in no position to be rude to his or her own neighbor.

First, the statute prohibits retaliation by a public company or "an employee ... of such company." Rather than defining "employee," the phrase "of such company" in section 1514A serves to designate from the larger group who are "employees" (however defined) the particular employees (employees of public companies) who may not retaliate. A limiting phrase such as "of such company" is not a definition; rather, it modifies the word (e.g., employee) whose *un*modified meaning remains the same. "Of such company" is no more a definition of "employee" than a definition of the other four nouns it limits: contractor, subcontractor, officer and agent. In the sentence "The junior Associate Justice opens the door," the adjective "junior" does not define "Associate Justice," but instead indicates who among the Associate Justices has that responsibility.

Second, the statute forbids retaliation against "an employee," without any limiting language; as a practical matter, however, it will usually be the case that the only individuals against whom an entity (or another employee of that entity) will be able to retaliate will be the entity's own employees.

Third, the covered actors are forbidden to retaliate because of protected activity by "the employee." Here the article "the" refers back to the particular individual who is the target of the retaliation; retaliation is forbidden only if in reprisal for whistleblowing by the targeted employee, not if in reprisal for whistleblowing by some other employee. The fourth and fifth references to "employee" are subject to the

same limitation ("the"), again referring to the specific employee who is the target of the retaliation.

(2) Respondents repeatedly characterize section 1514A as forbidding retaliation by a public company or a "representative" of a public company. "The statutory *text* provides that no public company, or representative of such company, may retaliate...." (R.Br. 6 (emphasis added)). In describing the actors (other than a public company) forbidden to retaliate, respondents use the term "representative" 21 times.[2] Because section 1514A forbids retaliation by a public company or its "representative," respondents reason, it follows that the individuals protected from retaliation must be employees of a public company.

But the term "representative" is not used in section 1514A at all; the actual words whose meaning matters are "contractor" and "subcontractor." Most contractors would not be described as "representatives"; they lack authority to sign contracts or to make commitments on behalf of the entity whose contractor they may be. And few if any contractors would have any authority to discriminate in the terms and conditions of employment against an employee of their counterparty. To support an inference that "employee" means only "employee of a public company," "contractor" would have to mean "contractual representative

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[2] R.Br. 5, 6 (three references), 7 (two references), 13, 15, 16 (two references), 19 (two references), 20 (two references), 24, 25, 26 (two references), 28, 29, 57.

authorized to take personnel actions against the employees of the public company." That idiosyncratically narrow interpretation is assuredly not the meaning of the broad phrase "*any* ... contractor ... of [a public company]." (Emphasis added).

(3) Respondents rely on the headings of section 806 and subsection 1514A(a), which refer to "protection of employees of publicly traded company." But respondents do not explain why the Court should disregard the heading of section 1514A – "Civil action to protect against retaliation in fraud cases" – which contains no such language. Respondents assert that *all* three headings support their view (R.Br. 6, 24), but they offer no explanation of how the section 1514A heading supports that interpretation.

The reference in the headings of section 806 and subsection 1514A(a) to "publicly traded companies" is necessarily shorthand; respondents acknowledge in footnote 5 of their brief that section 1514A also applies to report-filing companies that are *not* publicly traded. Respondents describe the body of section 1514A as "defining" the meaning of the phrase "publicly traded companies" (R.Br. 15), as if section 1514A defined "publicly traded company" to mean "publicly traded companies as well as non-publicly traded companies that are report-filing companies." But the text of section 1514A contains no such definition.

Respondents insist that the references in two headings to publicly traded companies "cannot be characterized as 'short-hand' for the 99% of companies

in America that are *not* publicly traded." (R.Br. 23) (emphasis in original). But we do not contend that "publicly traded companies" is shorthand for *all* privately held companies in the United States; we urge only that this phrase in the headings is shorthand for those particular entities that are expressly listed in the statute itself: publicly traded companies, report-filing companies and "contractor[s], subcontractor[s], [and] agent[s] of [public companies]."

II. RESPONDENTS' INTERPRETATION WOULD RENDER MEANINGLESS THE STATUTORY PROHIBITION AGAINST RETALIATION BY CONTRACTORS AND SUBCONTRACTORS

The ARB emphasized in *Spinner v. David Landau & Assocs., LLC*, 2012 WL 2073374 (DOL ARB May 31, 2012), that limiting "employee" to employees of public companies would render meaningless the prohibition against retaliation by contractors or subcontractors. (Pet.App. 150a). Respondents are unable to identify substantial real-world circumstances in which a contractor or subcontractor would be able to retaliate against a whistleblower employed by a different firm, the public company.

Respondents contend that under their interpretation section 1514A would at least apply in the circumstances depicted in the 2009 movie "Up in the Air." (R.Br. 24-25). In that film, employers seeking to lay off employees retain a fictional contractor, Career

Transitions Corporation, to deliver the news; one of that contractor's employees is portrayed by George Clooney, whom respondents describe as an "axe-wielding specialist." (R.Br. 24, 26). But section 1514A would not apply to this contractor because neither that firm nor Mr. Clooney had any role in selecting the workers to be dismissed, or any idea why those particular workers were losing their jobs. (Pet. 26).

To fit within section 1514A's prohibition, a contractor (or its axe-wielding specialist) would have to act with an intent to further the public company's retaliatory purpose. But no prudent public company would disclose to a contractor the retaliatory purpose of a termination. And there would be no reason for a retaliatory public company to use that circuitous route, because the company could simply fire the whistleblower itself. In addition, a contractor which acted with such an unlawful purpose would already be covered by section 1514A's prohibition against retaliation by an "agent" of a public company, rendering redundant the separate prohibitions against retaliation by "contractor[s]" and "subcontractor[s]." Respondents suggest that the "agent" provision of section 1514A could be rendered inapplicable (thus giving significance to the provision regarding contractors) if the public company and the contractor simply stipulated in their contract that the contractor "shall not be an agent." (R.Br. 27). But whether a firm is an agent within the meaning of section 1514A would be governed by section 1514A and principles of agency law, not by a contractual limitation.

Respondents suggest that the provision regarding retaliation by contractors could have meaning if a contractor retained by a public company, and accorded the power to select which of that company's workers would be fired, decided on its own to retaliate against a company whistleblower. (R.Br. 27). But no sensible public company would give an outside firm the authority to decide which of that company's own workers should be dismissed,[3] and such an outside firm would be unlikely to have any reason to retaliate against a public company's worker. A firm authorized by a public company to select and dismiss public company employees would be an "agent" of that company.

Respondents do not even attempt to explain how, under its narrow interpretation of section 1514A, a *sub*contractor could retaliate against the employee of a public company and thus violate that provision.

Even if there were a remote possibility that a uniquely situated contractor could somehow retaliate against an employee of a public company, virtually all contractors and subcontractors would lack the ability to do so and thus fall outside the scope of section 1514A. Respondents' narrow interpretation would change the application of section 1514A from "*any* ...

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[3] In *Tides v. Boeing Co.*, 644 F.3d 809, 811 (9th Cir.), *cert. denied*, 132 S.Ct. 518 (2011), the plaintiffs were retaliated against by their public company employer, not by a contractor.

contractor [or] subcontractor" (emphasis added) to "few if any contractors or subcontractors."

III. THE LEGISLATIVE HISTORY OF SECTION 1514A DOES NOT SUPPORT RESPONDENTS' NARROW INTERPRETATION

(1) The Senate Report's explanation of section 1514A expressed particular disapproval of Arthur Andersen's retaliation against a partner who objected to Enron's accounting gimmicks. Respondents argue that this reprisal is irrelevant, because "the Arthur Andersen *partner* would likely not be protected as 'an employee' even if Section 806 applied to private firms. *See, e.g., Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 449-50 (2003)." (R.Br. 33) (emphasis in original). But *Clackamas* expressly rejected the suggestion that an individual could not be an employee within the meaning of a statute if his or her job title was "partner." 538 U.S. at 446, 450. More fundamentally, the Committee's concern was not limited to retaliation against a particular individual; it objected to enforcement by accounting firms of a code of silence, regardless of who the victim might be.

The Senate Report also criticized the manner in which Enron's outside law firm had responded when Enron asked for advice about the legality of retaliating against an employee who had complained about accounting fraud. (Pet.Br. 59). Respondents dismiss the Report's reference to the law firm's action as misguided, reasoning that "Enron's outside lawyer

did not retaliate against any employee." (R.Br. 33). But the point was not about whether the firm had retaliated against anyone, but that the attorneys at the law firm had failed to act as "watchdogs" by raising questions about the accounting fraud suggested by Enron's query.

Respondents contend that Congress did not want to protect whistleblowers at Arthur Andersen because "the Senate report ... reveals that Congress was actually concerned with the protection of corporate '*insiders*,' not outside service providers. S.Rep. No. 107-146, at 10 (emphasis added)." (R.Br. 34). But while the accountants at Arthur Andersen worked for an outside service provider, they were assuredly "insiders." The accountants knew the critical facts about Enron's accounting schemes that eluded Enron's directors. In the instant case, the "insiders" who would know about any misconduct in the management of the Fidelity funds are employees of FMR; the funds themselves have no employee "insiders" of their own.

(2) The legislative history provides no support for respondents' contention that the purpose of prohibiting retaliation by contractors and subcontractors in section 1514A was to deal with retaliation by contractors against employees of public companies; in every instance in the legislative history describing the retaliating entity, that entity is the employee's own employer. S.Rep. 107-146, at 1, 2, 13, 19 (2002); 148 Cong.Rec. S1788, S1790 (March 12, 2002, remarks of

Senator Leahy); S. 2010, 107th Cong., 2002.[4] Similarly, the legislative history contains no suggestion that contractors and subcontractors were included merely to assure some form of secondary liability if a retaliatory public company went bankrupt.

Respondents rely on portions of the legislative history that refer to public companies. (R.Br. 7, 31-32). But those passages, including Senator Leahy's statement, are not references to section 1514A, but descriptions of the entire Act. Yet SOX clearly *does* apply to and regulate private companies, such as accounting firms that perform functions for public companies. Indeed, under section 1514A privately-held contractors and subcontractors are undeniably covered; the dispute in this case is about which employees those private firms are forbidden to retaliate against. Respondents point to references to "employees of publicly traded companies," as if to suggest that section 1514A must therefore be limited to such employees. But respondents acknowledge in footnote 5 of their brief that section 1514A expressly applies to employees of report-filing companies that are not publicly traded (R.Br. 23), so these portions of the legislative history are necessarily shorthand.

(3) Respondents rely heavily on bills introduced two years after the enactment of SOX that included a provision which would have expressly applied section

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[4] The language which eventually became section 806 of SOX was originally contained in S. 2010.

1514A to mutual fund advisers. (R.Br. 7, 34-35). But this Court has expressly warned against drawing any conclusions from such post-enactment events. *United States v. Craft*, 535 U.S. 274, 287 (2002). The proposed amendment was only a single, 6-line section of lengthy 51 page bills. The bills in question cannot fairly be described as having been "taken up," "considered," and "rejected" by Congress. (R.Br. 7, 10, 34, 35). Rather, these bills, like many thousands of other proposals, were simply referred to committee and died without any further action.

Respondents also rely on the 2010 Dodd-Frank Act provision that amended section 1514A to expressly apply it to nationally recognized statistical rating organizations (NRSROs). (R.Br. 7-8, 35-36; see 124 Stat. 1376 at 1848, 1852 (2010)). But no inference as to the intent of one Congress can be drawn from the actions of a different Congress eight years later. In 2002 NRSROs, because of their unique independent status, probably would not have been regarded as contractors within the meaning of section 1514A.

IV. RESPONDENTS' NARROW INTERPRETATION IS INCONSISTENT WITH THE INTENT OF CONGRESS TO INSURE THE ACCURACY OF MUTUAL FUND DISCLOSURES

Congress enacted section 1514A to assure the reliability of financial disclosures by public companies,

including mutual funds; respondent's crabbed interpretation would substantially frustrate that intent.

An express purpose of the Sarbanes-Oxley Act is "to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities law." 116 Stat. 745 (2002). FMR insists that section 1514A does not apply to most mutual fund advisers, which are privately held, because, unlike the mutual funds themselves "[*p*]*rivate companies are not required to make such disclosures.*" (R.Br. 37 (emphasis in original)).

But at Fidelity, as at most mutual funds, the "corporate disclosures made pursuant to the securities laws" are actually written by the mutual fund adviser, not by the mutual fund itself. Each year several thousand disclosure statements regarding Fidelity funds are filed with the SEC, totaling tens, if not hundreds of thousands, of pages. Those disclosures are not composed by anyone at a Fidelity fund, which have no employees. Rather, they are all written by FMR employees, and ordinarily only those FMR employees would know whether the disclosures are accurate and reliable. If section 1514A does not apply to FMR's employees, it could not as Congress intended improve the accuracy and reliability of those documents. Under FMR's proposed interpretation of section 1514A, FMR could dismiss any FMR employee who disclosed to the directors of or lawyers for the Fidelity funds that there were material falsehoods in the documents being filed by FMR with the SEC in the name of those funds. There is no reason to think

that Congress intended to leave this significant gap in the statutory scheme for assuring the reliability of those disclosures.

V. RESPONDENTS' NARROW DEFINITION IS INCONSISTENT WITH OTHER PROVISIONS OF THE SARBANES-OXLEY ACT

Under respondents' interpretation, section 1514A would permit a law firm to dismiss an attorney who complied with his or her obligations under SOX to report certain violations. (Pet.Br. 49-51). Respondents contend that under section 602 of SOX, "a law firm ... that engages in retaliation against such whistleblowing can be banned from further practice before the SEC. ... , a ... potent deterrent." (R.Br. 41). But section 602 does not forbid retaliation against whistleblowers. Although it does authorize the imposition of sanctions against lawyers who violate securities laws or regulations, 15 U.S.C. §78d-3(a), none of those provisions forbade retaliation when SOX was enacted. Similarly, section 105 of SOX authorizes sanctions against an accountant who violates SOX, certain securities laws, or the rules of the Public Company Accounting Oversight Board; but none of those provisions forbade retaliation against an accountant who engages in whistleblowing. 15 U.S.C. §7215(c)(4)(A)-(B).

Section 301 of SOX requires that the audit committee of every issuer establish procedures for "the receipt ... and treatment of complaints received by the issuer regarding accounting, internal accounting

controls, or auditing matters." 15 U.S.C. §78j-1(m)(4)(A). The section 301 complaint process would be emasculated if complainants could be fired for using it. Respondents describe section 301 as requiring the creation of a complaint process to entertain "employee complaints," and assures the Court that this complaint process and the section 1514A anti-retaliation protections "are ... both complementary and coextensive." (R.Br. 12). That account, however, assumes that section 301 is limited to complaints from the employees of the issuer. But the complaint process is not limited in that manner. See 15 U.S.C. §78j-1(m)(4)(A).

Respondents assert that it does not matter whether section 1514A forbids retaliation against employees of contractors and subcontractors who complain to the SEC, because section 1107 of SOX provides just such protection. (R.Br. 42). But as we explained earlier, section 1107 does not apply to individuals who provide information to the SEC. (Pet. Reply 4-5).

VI. PROTECTING EMPLOYEES OF CONTRACTORS AND SUBCONTRACTORS WOULD NOT DRAMATICALLY EXPAND THE STATUTE'S SCOPE

Respondents suggest that interpreting "employee" to include employees of a contractor would result in application of section 1514A to "employees of every mom-and-pop shop, partnership, and privately held

entity in America that does business with a public company." (R.Br. 45). At the least, they insist, there are "millions of private employers that contract with public companies" (R.Br. 10). "Many private companies have contracts or subcontracts of some sort with public companies...." (R.Br. 38).

(1) These arguments ignore the fact that most employees of contractors would not have access to the type of information that would be the basis of a section 1514A claim. Companies that violate securities laws or regulations or engage in criminal fraud are likely to seek to keep those practices secret from their own employees and from employees of contractors. Aside from lawyers, accountants and other financial services professionals, few contractor employees would know of such serious forms of misconduct.

(2) The language of section 1514A does not apply broadly to retaliation by any firm that "does business," "h[as] a contract," or "contracts" with a public company. Rather, the statute is limited to firms that are "contractors" of public companies, a significantly narrower category. In common parlance "contractor" is in two important ways narrower than an "entity that does business with [another firm]." First, "contractor" refers to a party whose performance of a contract will take place over a significant period of time.[5]

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[5] Section 1514A applies to contractors, not former contractors. Thus even if such a fleeting contract were deemed to render one of the parties a contractor, it would rarely, if ever, be the

(Continued on following page)

If the Supreme Court gift store sells a souvenir to a tourist, there is briefly a contract between the Court and the tourist; but no one would say that the Court is a "contractor" in that situation. Second, "contractor" refers to the party which provides the goods and services, but not to the party which buys them. The construction firm building a new house would not refer to its client as a contractor.

Thus most of the ways in which a mom-and-pop firm "does business with a public company" would not be a relationship in which that small firm is a "contractor." The owner of a small firm is not a "contractor of a public company" when he or she buys a box of paper clips at the local Wal-Mart store. A Wal-Mart "contractor" would be a firm that had some type of ongoing contract to provide goods or services *to* Wal-Mart. The number of such long term suppliers is assuredly far smaller than the number of private firms that buy paper clips or other items from Wal-Mart.

Those suppliers, moreover, are now subject to the anti-retaliation provision of the Dodd-Frank Act. Section 922 of that Act forbids *all* private employers, not just contractors of public companies, to retaliate against whistleblowers who report securities violations to the SEC. 15 U.S.C. §78u-6(h)(1)(A)(i)-(iii). Thus the primary impact today of applying section

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case that retaliation by such a party would occur during the few seconds it was covered by the statute.

1514A to employees of private contractors of public companies will be to protect *internal* whistleblowing, including complaints by outside accountants or lawyers to the officials of public companies.[6] Both the SEC[7] and the United States Chamber of Commerce[8] have recognized that companies benefit from such internal reporting of financial irregularities.

VII. THE ADMINISTRATIVE REVIEW BOARD'S DECISION IN *SPINNER* IS ENTITLED TO *CHEVRON* DEFERENCE

(1) The ARB's interpretation of section 1514A should be accorded deference under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). This Court has long "recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of ... adjudication that produces ... rulings for which deference is claimed." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). Deference is appropriate because where, as here, Congress "provides for a relatively formal deliberative procedure" that "foster[s] fairness and deliberation," it is "fair to assume" that Congress

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[6] The lower courts are divided regarding whether section 922 in at least some circumstances also protects internal whistleblowing. *Compare Murray v. UBS Securities, LLC*, 2013 WL 2190084 at *3-*4 (S.D.N.Y. May 21, 2013) *with Asadi v. G.E. Energy*, 720 F.3d 620 (5th Cir.2013).

[7] 76 Fed. Reg. 34300 (June 13, 2011).

[8] http://www.sec.gov/comments/s7-33-10/s73310-194.pdf

"contemplate[d] administrative action with the force of law." *Id.* at 230.[9] That inference has greater force with regard to statutes, such as SOX, adopted after the practice of according *Chevron* deference to adjudicative determinations was well established; Congress can fairly be assumed to have understood the significance that courts would attach to statutes providing for formal adjudication when it provided for such determinations in the resolution of administrative claims under section 1514A.[10] Accordingly, if the Court concludes that the statute is ambiguous, it should defer to the ARB decision in *Spinner*.

The ARB hears all administrative appeals regarding claims under section 1514A, and its decisions are informed by that substantial body of experience. In *Spinner* the ARB, which is familiar with the circumstances of a range of cases under section 1514A (and the similarly worded provisions of AIR 21), reasonably concluded that a contractor would rarely if ever be in a position to retaliate against an employee of a

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[9] See Secretary's Order 02-2012, 77 Fed. Reg. 69378, 69379 (Nov. 16, 2002)(ARB decisions binding).

[10] Prior to the enactment of SOX the lower courts had repeatedly accorded *Chevron* deference to adjudicatory decisions of the Secretary of Labor or the ARB interpreting federal anti-retaliation statutes. *Coupar v. United States Dep't of Labor*, 105 F.3d 1263, 1265 (9th Cir.1997) (meaning of the term "employee" in the Clean Air Act and the Toxic Substances Control Act); *Connecticut Light & Power Co. v. Secretary of the Department of Labor*, 85 F.3d 89, 94 (2d Cir.1996) (meaning of the term "employee" in the Energy Reorganization Act).

public company. (Pet.App. 150a, 175a-76a). Similarly, the ARB, in light of the knowledge of the number and types of administrative claims filed by employees of contractors, concluded that its interpretation of section 1514A was unlikely to result in a large number of such claims. (Pet.App. 166a).

(2) Relying on *Martin v. OSHRC*, 499 U.S. 144 (1991), FMR argues that deference to a statutory interpretation arrived at through formal adjudication is permissible only if the adjudicatory agency also had rulemaking authority. (R.Br. 46, 50-51). But this Court has never held that *Chevron* deference is owed to an agency's formal adjudications only if the agency also has rulemaking authority. To the contrary, in decisions since *Martin*, this Court has made clear that *Chevron* deference is generally warranted where Congress has authorized an agency to engage in formal adjudication *or* rulemaking. *Yellow Transportation, Inc. v. Michigan*, 537 U.S. 36, 45 (2002)(quoting *Martin*); *Mead*, 533 U.S. at 229 ("the process of rulemaking or adjudication"), 230 ("the fruits of notice-and-comment rulemaking or formal adjudication").

Martin involved an unusual division of agency authority that is not present here. The question was whether, when rulemaking and adjudicatory authority are divided between two different agencies, and the agencies adopt conflicting interpretations of a regulation, *Chevron* deference should be given to the rulemaking agency or to the adjudicatory agency. The Court concluded that, in the case of that "unusual regulatory structure," the rulemaking agency was

entitled to deference concerning the meaning of its own regulation. *Id.* at 152-53. In analyzing that issue, the Court stated that, *if* a single agency were given both types of authority (so-called "unitary agencies"), deference would be accorded to decisions made by the agency in the exercise of its adjudicatory powers. The Court did not hold that in *all* cases the existence of rulemaking authority is the basis for deference to adjudicatory decisions; rather, the Court explained that the existence of dual authority was the basis of such deference "in these cases," i.e., cases in which an agency enjoyed both types of authority. *Id.* at 154. The Court did not say that an agency that has expressly been granted only formal adjudicatory authority cannot issue decisions that are entitled to *Chevron* deference. And in *Mead*, the Court made clear that when an agency acts though formal rulemaking *or* adjudication, *Chevron* deference is appropriate. 533 U.S. at 229.

FMR argues that some form of policymaking or rulemaking authority existed in all of the cases in which this Court has approved deference to an adjudicatory decision. (R.Br. 50). That may be true, but the Court did not say in those decisions that it was only affording *Chevron* deference to the agency's adjudication *because* the agency had other, unexercised rulemaking authority. Whatever the non-adjudicatory authority of the agency in question may have been, it simply was not part of the basis of the decision to apply *Chevron* deference in those cases. Instead, the

Court focused on the authority that had been granted and exercised by the agency – adjudicatory authority.

(3) FMR's advances other reasons for declining to accord *Chevron* deference, none of which is persuasive. It does not matter that the ARB decision was not handed down in Lawson and Zang's own cases. *Chevron* deference, where appropriate, applies in any case presenting the legal issue previously adjudicated by the agency in question. E.g., *SEC v. Zandford*, 535 U.S. 813, 819-20 (2002). Plaintiffs did not waive their right to rely on a subsequent ARB's interpretation of section 1514A when they withdrew their administrative claims and filed suit in district court. The issue of deference to *Spinner* was not raised below only because *Spinner* was not decided until after the First Circuit's decision. The Secretary has delegated his authority to the ARB, and the exercise of such delegated adjudicatory authority is entitled to deference. E.g., *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). It is not the case, as FMR contends, that the ARB had held prior to *Spinner* that section 1514A does not apply to employees of private contractors of public companies.[11] To the contrary, the ARB had previously

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[11] *Fleszar v. Am. Med. Ass'n*, 2009 WL 891347 at *3-*4 (DOL ARB Mar. 31, 1999), held only that section 1514A requires more than proof that a defendant firm "does business with" a public company and that liability cannot be based on the fact that a defendant firm once had a contractual relationship with a public company which ended years before the alleged retaliation. (See pp. 16-17, *supra*.) In *Field v. BKD, LLP*, 2011 WL 2165860

(Continued on following page)

concluded that the statute *does* apply to employees of contractors and subcontractors of public companies. (Pet.App. 143a; U.S. Br. 31 & n.6).

FMR asserts that "[t]he vast majority of Section 806 cases are ... decided *de novo* in federal court, further indicating that Congress saw no need for DOL adjudicators to play an interpretive role." (R.Br. 9). Respondents point to no basis for its assertion that "the vast majority" of administrative claims are withdrawn prior to final agency action. The frequency or infrequency with which claimants today exercise their right to file suit without awaiting a final agency decision throws no light on the intent of Congress when it enacted section 1514A in 2002. The decision of Congress to permit claimants to file suit in district court without awaiting a final agency decision does not reflect any denigration of the weight to be accorded such final decisions, but merely gives claimants the option of proceeding directly to court rather than incur additional delay in the administrative process. The judicial assessment of actions commenced in district court under section 1514A(b)(1)(A) is *de novo* simply because in those cases there is no final decision to which to defer.

Although the ARB in *Spinner* referred to section 1514A's procedural regulations, the ARB made an

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at *3 (DOL ARB May 27, 2011), the claimant's employer was not a contractor of a public company.

independent evaluation of the proper interpretation of the statute. The ARB's opinion expresses its own conclusions about the meaning of the law. E.g., Pet.App. 148a ("[t]he statute contains no ... limitation [to employees of public companies]"), 161a ("[t]he overall statutory framework and purpose demonstrate, indeed require, that Section 806 protects whistleblowing by employees of contractors and subcontractors to the public company"). The ARB's opinion also contains repeated statements about what "we" – the Board – conclude. See Pet.App. 151a ("we ... turn to other rules of statutory interpretation"), 154a ("we conclude that Congress did not intend for the content of the caption to limit coverage"), 165a ("[w]e find that Congress intended to cover employees of contractors under Section 806"). The references to the procedural regulations are only a few phrases in an exhaustive, 10,000 word substantive analysis. The ARB's own assessment of the statute and its legislative history is assuredly an independent basis of its decision.

Even if *Chevron* deference were not appropriate in this case, the exceptionally well-reasoned ARB decision in *Spinner* would certainly warrant deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Events subsequent to the enactment of SOX have confirmed the importance of the whistleblowing protection in section 1514A. Following the collapse

of a series of seemingly-sound major financial institutions, former officials and directors of those companies have insisted that they did not fully understand the complex transactions and instruments – drafted by lawyers and approved by accountants – which contributed to those failures. Mutual funds, whose analysts relied on Enron's misleading public financial statements and lost billions when Enron collapsed in 2002, again relied on those types of statements and lost billions more in 2008. Outside law and accounting firms which understood the complexities and risks of what proved to be toxic arrangements did not invariably communicate that information to high corporate officials. Complaints to management or the SEC by employees of those firms could have saved investors billions of dollars. During the dark days of autumn 2008, at least a few corporate officials may have wished that they, or even the government, had been told more before things got so out of hand.

The briefs filed in this case by FMR and its amici, however, reflect no concern that such problems could occur yet again. Associations representing the nation's financial institutions evince no interest in being warned by their lawyers or accountants of securities violations or fraud. An association of mutual fund directors, whose immunity from individual liability rests on their personal ignorance of securities violations, urges the Court to legalize dismissal of any fund adviser employee who discloses problems to the directors themselves. FMR has apparently concluded that its own interests would now best be

served by limiting the protections of section 1514A to employees of public companies, even though doing so will deny whistleblower protection to the accounting and law firm employees who would know about financial irregularities at the very companies in which FMR is investing trillions of its clients' dollars.

It is earnestly to be hoped that the financial abuses and frauds of recent decades have ended, and that in the years ahead there will be little misconduct for a whistleblower to report. But Congress did not frame the section 1514A prohibition against retaliation by contractors to expire whenever confidence – however justified – returned to the financial markets.

CONCLUSION

For the above reasons, the decision of the First Circuit should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

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IN THE
Supreme Court of the United States

JACKIE HOSANG LAWSON AND
JONATHAN M. ZANG,

Petitioners,

v.

FMR LLC, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the brief in opposition remains accurate.

TABLE OF CONTENTS

Page

ARGUMENT 1

I. AS THE GOVERNMENT EXPLAINS, THIS CASE DOES NOT WARRANT REVIEW 1

II. THE DECISION BELOW IS CORRECT 4

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES

Christopher v. SmithKline Beecham Corp.,
132 S. Ct. 2156 (2012) 11

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 5

Fleszar v. U.S. Dep't of Labor,
598 F.3d 912 (7th Cir. 2010) 1

Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296 (2011) 11

Mohasco Corp. v. Silver,
447 U.S. 807 (1980) 6

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 11

Spinner v. David Landau & Assocs., LLC,
Nos. 10-111, 10-115, 2012 WL 2073374
(DOL ARB May 31, 2012) 1

United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.,
484 U.S. 365 (1988) 5

STATUTES

7 U.S.C. § 26 10

12 U.S.C. § 5567 10

15 U.S.C. § 78u-6 9

15 U.S.C. § 80a-1 8

15 U.S.C. § 80b-1 8

18 U.S.C. § 1514A(a) 6, 7

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) 4, 7

OTHER AUTHORITIES

Mary Ellen Biery, *Public Companies Out-Invested by Private Firms*, Forbes, Sept. 21, 2012 7

SEC, *Annual Report on the Dodd-Frank Whistleblower Program: Fiscal Year 2012* 9

ARGUMENT

The government correctly concludes that the decision below does not warrant review because there "is no disagreement in the circuits . . . , the issue has arisen infrequently, and no circuit has had the opportunity to consider the ARB's recent decision" in *Spinner v. David Landau & Associates, LLC*, Nos. 10-111, 10-115, 2012 WL 2073374 (DOL ARB May 31, 2012). U.S. Br. 8. Thus, notwithstanding the government's unfounded criticisms of the First Circuit's analysis, the Fidelity respondents agree with the government's recommendation that the petition for a writ of certiorari should be denied.

I. AS THE GOVERNMENT EXPLAINS, THIS CASE DOES NOT WARRANT REVIEW.

In the decision below, the First Circuit held that only employees of the defined public companies, not employees of private contractors and subcontractors, may pursue a civil action under Section 806. Pet. App. 17a. Similarly, in *Fleszar v. United States Department of Labor*, 598 F.3d 912 (7th Cir.) (Easterbrook, C.J.), *cert. denied*, 131 S. Ct. 423 (2010), the Seventh Circuit rejected the contention that Section 806 provides whistleblower protection to employees of any "contractor, subcontractor, or agent" of a public company. *Id.* at 915. The federal district courts are in accord. *See* Respondents' Brief in Opposition ("BIO") 14-15.

It is beyond dispute that the First Circuit's decision in this case "does not conflict with the decision of any other court of appeals on the question presented." U.S. Br. 16. Indeed, neither petitioners nor the government have identified *any* conflicting authority from any Article III court on the sole issue presented in the petition.

It is equally undisputed that "the issue has arisen infrequently" (U.S. Br. 8), and the government points to no cases not previously addressed by the parties. The government has thus confirmed our observation that there are no similar cases working their way through the system. And petitioners do not disagree: "The Solicitor General correctly observes that until now there have been few incidents in which employees of contractors have complained of being retaliated against for disclosing corporate malfeasance." Supp. Br. 5.

Notably, the government does not agree that a conflict between decisions of a court of appeals and the ARB warrants this Court's review. *See* U.S. Br. 16-19. As the government observes, no circuit—including the First Circuit—has yet had the opportunity to consider the ARB's decision in *Spinner*. *See* U.S. Br. 17-18 & n.7. Congress made ARB decisions reviewable in the courts of appeals so that the judiciary can provide an independent review of the statutory scheme administered by the Department of Labor. Petitioners' suggestion that this Court should grant, vacate, and remand for consideration in light of *Spinner* (Supp. Br. 9-10)—a suggestion not endorsed by the government—is frivolous. There will be ample opportunity for judicial consideration of *Spinner* on direct appeal.

In their supplemental brief, petitioners offer three reasons why the Court should not allow the issue to percolate. All are unavailing.

First, petitioners contend that the extant decisions are "unusually exhaustive" and thus future decisions are not "likely to add anything." Supp. Br. 6. That is a reason to deny review, not grant it. The issue has been vigorously litigated and the courts of

appeals are thus far unanimous in rejecting the strained interpretation of the statute proffered by petitioners. Unless and until a conflict among the courts of appeals develops, there is no need for this Court's review.

Second, petitioners disagree with the Solicitor General's conclusion that future litigation would give the courts the opportunity to consider the deference due to the Department of Labor's pronouncements in this area. *See* Supp. Br. 8. But the important point is not, as petitioners suggest (*ibid.*), that the First Circuit has "preemptively" resolved the deference question; this case is highly unusual because the Department of Labor *expressly disclaimed* deference to the Department's procedural regulation in the court below. Therefore no deference arguments are available to the government in *this* case.

Third, petitioners argue that in light of continued uncertainties in the financial markets, it is "important to clarify" whether employees of private contractors are covered by the Sarbanes-Oxley whistleblower provision. Supp. Br. 11. That argument is belied by the absence of similar cases and the unanimity of judicial approaches to the question, and ultimately is just a rehash of petitioners' contention that the decision below is wrong on the merits. We turn to that next.

II. THE DECISION BELOW IS CORRECT.

Although respondents agree with the government's ultimate conclusion that the petition for a writ of certiorari should be denied, the government's criticisms of the decision below are not well taken.

According to the government, the First Circuit's decision creates "an unwarranted gap in whistleblower protection." U.S. Br. 7, 16. Both the government and petitioners are of the view that Sarbanes-Oxley *must* protect employees of private contractors, including some mutual fund advisers, if they complain about violations of the securities laws by their public-company clients. U.S. Br. 7, 17; Supp. Br. 2-3.

The tautological construction advanced by petitioners and the government (*i.e.*, whistleblowers must be protected, so Sarbanes-Oxley must protect them) disregards the text and structure of Sarbanes-Oxley and numerous other statutes that protect whistleblowers, including the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank"). This Court has repeatedly rejected the argument that any asserted "loophole" must be corrected by expansive judicial interpretation. BIO 24-27. This is particularly so here because, as discussed below, Congress has separately covered persons in petitioners' position.

1. The government erroneously contends that the statute prohibits a "contractor" or "subcontractor" of a public company from retaliating against "an employee," without limiting that protection to employees of public companies. U.S. Br. 7, 8. The government's myopic focus on the words "an employee" disregards the long-standing maxims that statutory interpretation is a "holistic endeavor" and that words

must be construed in harmony with the rest of the language in a statutory provision. *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.").

The context makes clear that the private cause of action is available only to employees of public companies. By identifying the broad range of entities and persons who are prohibited from engaging in retaliation, Section 806 makes the point—basic to corporate law generally—that a corporate legal entity may not take forbidden action through any of its officers, employees, agents, or contractors. Contrary to the government's contention, that list does not identify entities that are forbidden from discriminating against their *own* personnel. U.S. Br. 8. Corporate officers and employees do not typically have their own employees, yet the government's and petitioners' reading yields the absurd result that the statute prohibits every officer and every employee from harassing or intimidating his or her own employees. This anomalous result confirms that the government's and petitioners' open-ended reading is not correct. *See* BIO 23-24.[1]

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[1] Contrary to the government's assertion, it is not difficult to think of situations where a subcontractor could retaliate against the employee of a public company. U.S. Br. 9. A subcontractor could easily retaliate against an employee of a public company if there is a close relationship between the public company and the service provider, such as between an issuer of securities and its auditor. That is far more plausible than peti-

Furthermore, in prohibiting an "employee" of "such company" from discriminating against an "employee," Congress used the word "employee" twice in the same sentence. 18 U.S.C. § 1514A(a). Applying the presumption of consistent usage, the natural reading of the term "employee" is that Congress meant to refer to employees of public companies in both instances. *See Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) ("In the end, we cannot accept respondent's position without unreasonably giving the word 'filed' two different meanings in the same section of the statute."). Thus, the text makes clear that Congress meant to preclude affiliated agents, contractors, subcontractors, officers, and employees from retaliating against a public company's employees.

The title and caption are not, as the government argues, "a short-hand description" Congress used for employees of any entity that conceivably could be covered by a broad construction of the term "employee." U.S. Br. 10. Far from a casual reference, both the title of Section 806 in the public law and the caption of the whistleblower provision are a summary of the statute's domain: public companies. Although Section 15(d) companies are not publicly *traded* on the stock exchange, they are publicly *owned*.

According to the government, it was reasonable to exclude related private companies from the title and caption because it would be too "cumbersome" to mention them. *See* U.S. Br. 10. To the contrary, if Congress had really meant to cover the employment

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[Footnote continued from previous page]

tioners' and the government's construction that would prevent an employee from retaliating against his or her own employee.

practices of all private contractors and subcontractors of public companies, it surely would have given a clearer indication of that sweeping intent. Instead, Congress focused on the public companies subject to the new obligations and liabilities under Sarbanes-Oxley.[2]

Of the more than 6 million U.S. employers in 2007, just 4,584 were listed on a U.S. stock exchange. *See* Mary Ellen Biery, *Public Companies Out-Invested by Private Firms*, Forbes, Sept. 21, 2012. It is simply implausible that Congress meant to regulate *millions* of private employers *sub silentio* because they have contracts with public companies. Such a reading would enormously expand civil liability in a manner that could burden employers, and thus the economy, with claims that Congress clearly did not authorize. *See* BIO 24-27.

That conclusion is confirmed by a later amendment to Section 806 that expressly includes employees of statistical rating agencies, some of which are private companies. 18 U.S.C. § 1514A(a), *as amended by* §§ 922(b), 929A, 124 Stat. at 1848, 1852. If the government and petitioners were correct that Section 806 includes private contractors of public companies, then rating agencies would already have been covered as contractors and there would have been no need for the amendment. Quite simply, Congress

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[2] Although the title of Section 1514A as a whole does not mention public companies, the titles, captions, and statutory text increasingly become more specific about the types of covered companies. It is unlikely that Congress intended the title of Section 1514A as a whole to *broaden* the title of Section 806, the caption of 1514A, and the actual text of Section 806, which all make clear that protection is intended for employees of *public companies*.

has never authorized suits by employees of all public companies' contractors and subcontractors, and the government is advancing a sweeping statutory construction that is refuted by the text.

The government's discussion of the legislative history ignores congressional intent to regulate *public* companies. Moreover, Sarbanes-Oxley was directed at accounting firms and lawyers, not investment advisers to mutual funds. *See* BIO 30-31. Congress addressed concerns about accountants and lawyers by creating a new regulatory agency (the Public Company Accounting Oversight Board) and adopting detailed provisions regulating corporate auditors and lawyers in their representation of public companies. *See* BIO 28-30. Congress, however, did *not* focus on mutual fund investment advisers, which are separately and comprehensively regulated by the Investment Company Act, 15 U.S.C. § 80a-1 *et seq.*, and the Investment Advisers Act, 15 U.S.C. § 80b-1 *et seq*. Nothing in Sarbanes-Oxley was intended to supplant that well-established regulatory regime. In fact, a subsequent effort to extend Sarbanes-Oxley to investment advisers failed. Pet. App. 40a-43a. Neither petitioners nor the government dispute that their proposed construction of the statute is designed to do precisely what this failed amendment would have done. It is not the courts' job, however, to make such legislative decisions. *See* BIO 26, 32.

For these reasons, the government is simply mistaken in asserting that "[t]he frustration of congressional purpose resulting from the court of appeals' interpretation . . . is particularly acute in the mutual fund industry." U.S. Br. 12. Congress was well-aware that many employees in the mutual fund industry work for privately owned companies, while

others work for public companies. The policy decision to extend Sarbanes-Oxley protections to employees of public companies, rather than to employees of all investment advisers, should be respected. *See* BIO 30. Employees of private companies are still covered by a complementary regime of administrative, civil, and criminal remedies that protect whistleblowers, deter misconduct, and encourage reporting. Extending the civil cause of action in Sarbanes-Oxley to cover employees of all mutual fund investment advisers would upset the careful balance struck by Congress and would have serious policy ramifications for the financial markets, economy, and job creation.

2. In arguing that the decision below leaves certain whistleblowers unprotected, the government does not so much as mention Section 922 of Dodd-Frank and its express coverage for whistleblowers who report to the SEC, as petitioners did here. Section 922 of Dodd-Frank creates a private cause of action for individuals who are discharged or discriminated against by their employers for providing information to the SEC relating to a potential violation of the securities laws. 15 U.S.C. § 78u-6. Section 922 further requires the SEC to award whistleblowers monetary compensation for providing certain tips about possible securities law violations. Although the Section 922 program is relatively new, it has already yielded substantial benefits, as detailed in its annual report.[3]

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[3] *See generally* SEC, *Annual Report on the Dodd-Frank Whistleblower Program: Fiscal Year 2012*, *available at* www.sec.gov/about/offices/owb/annual-report-2012.pdf.

Importantly, the SEC, which is more expert than the Department of Labor in administering the securities laws, implements the protections provided in Section 922. The SEC did not sign the government's brief; although petitioners attribute this fact to the SEC's disagreement with the government's recommendation to deny certiorari (Supp. Br. 2), it is far more likely that the SEC does not agree that Sarbanes-Oxley should be stretched to cover conduct that falls within the express ambit of Dodd-Frank. Section 922 of Dodd-Frank provides a congressionally authorized alternative remedial scheme that makes the contortionist construction of Sarbanes-Oxley urged by petitioners (and echoed by the Labor Department) entirely unnecessary. *See* BIO 31-32. The government's brief does not contradict that fundamental, and irrefutable, point.

Petitioners do not address Section 922 in their supplemental brief, and their previous assertion that Section 922 "does not apply to any federal agency other than the SEC" (Pet. Reply 6) is not only irrelevant on the facts of this case—because petitioners brought their complaints to the SEC—but disregards other provisions of Dodd-Frank that extend equivalent protections to employees who report potential violations to the CFTC (7 U.S.C. § 26) or banking regulators (12 U.S.C. § 5567). The very existence of Dodd-Frank negates any need to expansively interpret Section 806 of Sarbanes-Oxley (and may explain why cases like this one are not recurring). Again the government's brief does not disagree.

3. Finally, the government's bid for deference to the Department of Labor's position is most notable for what it does not say. U.S. Br. 16. The government contends that "[a]t a minimum, the Department's consistent and reasonable position should

have been afforded deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)." U.S. Br. 15. Yet, in the court below the Secretary disclaimed *Chevron* deference for the Department of Labor's regulation and did not claim *Skidmore* deference. *See* Pet. App. 46a-50a.

In this Court, the government does not dispute that neither the Department of Labor nor the Securities and Exchange Commission has substantive rulemaking authority to interpret Section 806, and admits that the Department of Labor has deemed its regulation *procedural*. U.S. Br. 14. Nor does the government attempt to rebut respondents' showing that the statutory scheme providing for overlapping adjudicative authority in the federal district courts indicates that Congress did not intend either agency to have a policymaking role. *See* BIO 18. Such complex issues should not be raised for the first time in this Court, which is yet another reason to deny review.

Nevertheless, the government contends that the ARB's recent decision in *Spinner* is entitled to *Chevron* or *Skidmore* deference. *See* U.S. Br. 15. In making that claim, the government does not mention that the ARB's analysis in *Spinner* was controlled by the procedural regulation (BIO 15-16), much less attempt to explain how the ARB's application of a procedural regulation has more authority than the underlying regulation. Such arguments, which were not presented to or resolved by the First Circuit, should be considered by the lower courts in the first instance. *Cf. Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168-70 (2012) (according no deference to a DOL *amicus* brief); *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct.

2296, 2303-05 & n.8 (2011) (according no deference to SEC's views on scope of private right of action).

Petitioners open their supplemental brief by invoking "[t]he *singular* importance of the question presented." Supp. Br. 1 (emphasis added). Although they presumably mean to use the word in its sense of "remarkable" or "exceptional," its alternative meaning of "unique" better fits this case. This case is the first in which the applicability of the Sarbanes-Oxley whistleblower provision to employees of private contractors was squarely presented to a federal court of appeals; and the First Circuit's resolution of that question accords with all other judicial authority as well as the text and structure of the statute. Petitioners disagree with that decision, but that is no basis for this Court's review. As the Solicitor General correctly concludes, it would be "premature" for this Court to address the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

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SUPPLEMENTAL BRIEF

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JACKIE HOSANG LAWSON and JONATHAN M. ZANG,

Petitioners,

v.

FMR, LLC, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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TABLE OF CONTENTS

Page

I. The Question Presented Should Be Resolved Without Further Delay. 1

II. Additional Lower Court Litigation of The Question Presented Would Serve No Useful Purpose. 6

Conclusion. 12

TABLE OF AUTHORITIES

Page(s)

CASES:

Brady v. Calyon Securities(USA), 406 F.Supp. 2d 307 (S.D.N.Y. 2005). 4

Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984) 7, 9

Gabelli v. SEC, 133 S.Ct. 1216 (2013).. 4

Lawrence v. Chater, 516 U.S. 163 (1996)(per curiam).. 9

Long Island Care At Home, Ltd. v. Coke, 546 U.S. 1147 (2006).. 10

Malin v. Siemens Medical Solutions Health Services, 638 F.Supp. 2d 492 (D.Md. 2008). 4

Mouelle v. Gonzales, 548 U.S. 901 (2006). 10

Slekis v. Thomas, 525 U.S. 1098 (1999). 10

Spinner v. David Landau & Assocs., LLC, 2012 WL 1999677 (ARB May 31, 2012). . . . . *passim*

Stutson v. United States, 516 U.S. 163 (1996). 10

Thanedar v. Time Warner, Inc., 2008 WL 8886544 (S.D.Tex. Oct. 7, 2008).. 4

STATUTE:

29 U.S.C. Section 1514A. . . . . *passim*

Table of Authorities continued

Page(s)

OTHER AUTHORITIES:

John Gamble, "Whistleblower Claims; Sarbanes-Oxley Act," National Law Journal, April 3, 2006..... 4

Hogan and Hartson, "Whistle While You Work: Protecting your company from whistleblower threats under Sarbanes-Oxley,"(Nov. 16, 2006), available at http://www.hoganlovells.com/files/Event/591fad52-3453-4bd8-b251-83f77ccfaf73/Presentation/EventAttachment/96002708-319c-4ac9-af89-51eb4c08dfd3/SarbanesOxley.pdf 4

OSHA Fact Sheet, "Filing Whistleblower Complaints under the Sarbanes-Oxley Act", available at http://www.osha-gov/publications/osha-factsheet-sox-act.pdf..... 1

I. THE QUESTION PRESENTED SHOULD BE RESOLVED WITHOUT FURTHER DELAY

The singular importance of the question presented weighs heavily in favor of review by this Court. In adopting section 1514A, Congress sought to assure employees with information about corporate fraud or securities violations that they could report that malfeasance without fear of reprisal. "[C]ongress understood that to effectively address corporate fraud, [section 1514A] needed to extend to entities related to public companies—accounting firms, law firms, and the like—which may themselves be involved in performing or disguising fraudulent activity." U.S. Br. 13-14 n. 4 (*quoting Funke v. Federal Express Corp.*, 2011 WL 3307574, at *5-*6 (ARB July 8, 2011)).

But with regard to "outside accountants, auditors, and lawyers, [those] who are most likely to uncover and comprehend evidence of potential wrongdoing" (U.S.. Br. 12) (*quoting* Pet. App. 158a), the congressional attempt to provide that vital assurance has so far largely been a failure. Eleven years after the adoption of Sarbanes Oxley, outside accountants, auditors and lawyers, and mutual fund employees who work for privately held fund advisers, still do not know if they are protected by section 1514A.

Today the Department of Labor website advises in equivocal terms that employees of a public company's "contractors, subcontractors, or agents *may* also be covered [by section 1514A]."[1] For an accountant or

[1] OSHA Fact Sheet, "Filing Whistleblower Complaints under the Sarbanes-Oxley Act," at 1 (emphasis added), available at http://www.osha-gov/publications/osha-factsheet-sox-act.pdf, visited April 21, 2013.

mutual fund adviser employee who could be putting his or her livelihood in jeopardy by making the types of disclosures which Congress intended to encourage, "may" is not good enough. The Solicitor General suggests that a definitive resolution of this issue should now be postponed, perpetuating the current state of uncertainty. The Securities and Exchange Commission, which filed a separate brief in the court below and which is responsible for enforcing the nation's securities laws, has not joined the Solicitor General's brief in this Court advocating that delay.

The government correctly describes the significance of the issue presented. "The question . . . is an important one. The court of appeals' decision creates a gap in whistleblower protection under the Sarbanes Oxley Act, contrary to Congress's purpose of protecting insiders from retaliation when they report fraud or violations of securities regulations." U.S.Br.16. "The frustration of congressional purpose . . . is particularly acute in the mutual fund industry." *Id.* at 12; see *id.* at 7 (the First Circuit "rule creates an unwarranted gap in whistleblower protection for many of the employees in the best position to discover and report corporate fraud"), 12 (the "gap in protection [is] especially troubling with respect to mutual fund companies").

That gap in protection is most serious in the First Circuit, where the Department of Labor's website statement that contractor employees "may . . . be covered" holds out hope of legal protection which today does not exist in that circuit. But the harm of the decision below is not limited to whistleblowers or others who live and work in the First Circuit. The First

Circuit's decision directly affects investors throughout the nation who own stock in mutual funds headquartered in the First Circuit, including funds issued by such major groups as Fidelity, John Hancock and Putnam Investments. Pet. 35 n. 27. Similarly at risk are investors in any circuit who own stock in public companies headquartered and audited by accountants in the First Circuit. Indeed, public companies anywhere in the United States, which in some instances have moved operations abroad to avoid the strictures of American law, could now respond to the First Circuit decision by asking that the auditing of some or all of their activities be done by accountants in Boston.

Outside the First Circuit, the very uncertainty as to whether section 1514A protects employees of accounting firms, mutual fund advisers, and other outside contractors is itself a major obstacle to the reporting of the malfeasance covered by the statute. Section 1514A can provide meaningful assurance to employees that their disclosures would be legally protected, and can effectively deter reprisals, only if it is clear that the law indeed applies to those workers. From the perspective of an employee deciding whether to incur the risks inherent in reporting corporate misconduct, the uncertainty that reigns outside the First Circuit is as powerful a deterrent to disclosure as the state of the law in the First Circuit itself. No prudent employee who understands the current state of the law would—or should be asked to–endanger his or her career in order to further the percolation of the question presented.

This is a longstanding problem. Prior to the First Circuit decision in the instant case, the leading case in this area of the law was the widely cited[2] decision in *Brady v. Calyon Securities(USA)*, 406 F.Supp. 2d 307, 318 (S.D.N.Y. 2005), which held that section 1514A does not protect employees of contractors. Major law firms throughout the United States, including Hogan and Hartson, advised their clients in light of *Brady* that employees of contractors were not protected by section 1514A.[3] The National Law Journal predicted that "the majority of courts will probably agree with . . . *Brady*."[4] In *Gabelli v. SEC*, 133 S.Ct. 1216 (2013), the Solicitor General argued that it was impossible for the SEC to discover until 2008, six years after the adoption of section 1514A, that the fund adviser in that case had violated federal securities law, and pointed out that the employees of the fund adviser had failed to disclose its improper activities even to the mutual fund's own board of directors.[5]

2 E.g., *Thanedar v. Time Warner, Inc.*, 2008 WL 8886544 at *11 (S.D.Tex. Oct. 7, 2008); *Malin v. Siemens Medical Solutions Health Services*, 638 F.Supp. 2d 492, 502 (D.Md. 2008).

3 E.g., Hogan and Hartson, "Whistle While You Work: Protecting your company from whistleblower threats under Sarbanes-Oxley," at 2, 6 (Nov. 16, 2006), available at http://www.hoganlovells.com/files/Event/591fad52-3453-4bd8-b251-83f77ccfaf73/Presentation/EventAttachment/96002708-319c-4ac9-af89-51eb4c08dfd3/SarbanesOxley.pdf, visited April 22, 2013.

4 John Gamble, "Whistleblower Claims; Sarbanes-Oxley Act," National Law Journal, April 3, 2006.

5 Brief for Respondent, 5-6, 50-51.

The Solicitor General correctly observes that until now there have been few incidents in which employees of contractors have complained of being retaliated against for disclosing corporate malfeasance. U.S.Br. 8. Since the enactment of section 1514A, on the other hand, there have been a large number of retaliation complaints and lawsuits by individuals directly employed by public companies themselves. The difference in the willingness of these two groups to disclose corporate misconduct is important, because, as the government itself emphasizes, the employees of accounting firms, mutual fund advisers and other contractors are the individuals "*most* likely to uncover and comprehend evidence of potential wrongdoing." (U.S.Br. 12)(emphasis added). That employees of contractors would be less willing to report such malfeasance is not at all surprising; Congress enacted section 1514A precisely because it believed that workers would be more willing to disclose fraud and securities violations if they were guaranteed legal protection from retaliation. The quite understandable comparative reluctance of contractor employees to report such misconduct counsels in favor of, not against, granting review to hold that section 1514A does indeed apply to employees of contractors.

The Solicitor General notes that:

> [d]espite the court of appeals' erroneous decision, whistleblowers who work for privately held accounting firms, law firms, and investment advisers to public companies will still be able to file complaints with the

> Secretary, who will still adjudicate those complaints to determine whether unlawful retaliation occurred, and the ARB will continue apply its decision in *Spinner* to claims outside of the First Circuit.

U.S.Br. 17. But potential whistleblowers need, and are entitled to, more than mere access to a time-consuming and potentially expensive formal administrative adjudication process, after which a circuit court could still decide that retaliation is actually lawful. Section 1514A is not going to encourage disclosures by the individuals who have critical information about corporate wrongdoing until and unless this Court resolves the current uncertainty regarding the scope of that provision.

II. ADDITIONAL LOWER COURT LITIGATION OF THE QUESTION PRESENTED WOULD SERVE NO USEFUL PURPOSE

(1) The five opinions in this case and *Spinner* are unusually exhaustive, encompassing a significantly more thorough and reflective body of lower court analysis than is presented by the typical circuit conflict. The Solicitor General does not suggest that future lower court decisions are likely to add anything to the exceptionally detailed analyses already set out in those decisions. The government correctly describes the opinions in *Spinner* as "comprehensive[]" and "extensive" (U.S. Br. 7, 15, 18), and the First Circuit opinion is equally thorough. In this Court the government's own brief regarding the merits of the question presented presages what could be expected if

subsequent lower court decisions addressed whether section 1514A applies to employees of contractors; the government's eight page analysis of the merits of this question, encompassing at least that many distinct issues, is avowedly an annotated summary of the arguments already made by lower court opinions in this case and *Spinner*. U.S.Br. 8-16.

The Solicitor General suggests that review by this Court should be delayed to permit the lower courts to consider whether the ARB decision in *Spinner* is entitled to *Chevron* deference. U.S.Br. 17-18. But the lower courts—including in this very case the First Circuit—are already in agreement that *Chevron* deference can be given to a formal agency adjudicatory decision. See Pet. App. 50a (citing *Welch v. Chao*, 536 F. 3d 269, 276 n. 2 (4th Cir. 2008)). Here, as in any case in which a party argues for *Chevron* deference, the appropriateness of deference would turn on whether the statutory language at issue is ambiguous. Thus if, as the Solicitor General proposes, the lower courts were called upon to decide whether the ARB's decision in *Spinner* is entitled to *Chevron* deference, that determination would turn on a single question, whether the language of section 1514A(a) unambiguously excludes employees of contractors and subcontractors. But that is the very textual issue that has already been exhaustively addressed by the five opinions in this case and *Spinner*.

(2) The Solicitor General suggests that certiorari be denied so that "the First Circuit . . . [would] be permitted to consider whether the ARB's decision in *Spinner* is entitled to *Chevron* deference." U.S.Br. 18.

But the First Circuit has already announced that it would not reconsider its decision in light of a subsequent ARB decision—which has now occurred in *Spinner*—and it is unlikely the First Circuit will have an opportunity to address this issue in some future case if this Court denies certiorari in the instant case, rather than remanding it for further consideration.

The First Circuit, anticipating that the ARB might later issue a definitive decision regarding the meaning of section 1514A, specifically and preemptively held that any such future ARB decision would not be entitled to deference. "[I]f there were an on-point holding of the ARB, it might be entitled to some deference as to any ambiguity in the statute. The point is irrelevant . . . . [W]e find no ambiguity, so no deference is owed." Pet.App. 50a.; see Pet.App. 22a ("[w]e do not think there is any ambiguity left"), 31a n. 15 ("we conclude that the text of § 1514A(a) is unambiguous in limiting whistleblower protection to employees of public companies"), 46a ("Because the term 'employee' in § 1514A(a) is not ambiguous, we would not defer to an administrative agency's contrary determination, even had Congress delegated authority to the agency [to promulgate substantive regulations]").

The government suggests that the First Circuit might now be persuaded by the reasoning of the ARB decision in *Spinner*. But the ARB's holding that section 1514A(a) is ambiguous assuredly will not cause the First Circuit to reconsider its contrary conclusion, because the ARB's analysis rests on the very textual arguments that the First Circuit itself has already

expressly rejected. *Compare* Pet. App. 16a-22a *with id.* at 148a-52a.

If the Court wishes to "permit [the First Circuit] to consider whether the ARB's decision in *Spinner* is entitled to *Chevron* deference" (U.S.Br. 18), the Court should not deny certiorari. It is quite unlikely that, if certiorari were denied in the instant case, the First Circuit would in the future have an opportunity to address the issue in some other case. The panel decision below is binding on district courts and panels in the First Circuit. No employee who understood that situation would risk retaliatory dismissal on the remote chance that, after his or her claim had necessarily been rejected by a district court and appeals panel in that circuit, the First Circuit would grant rehearing en banc, a course of action that circuit has already rejected. Similarly, no prudent attorney would accept a case which could only succeed if rehearing en banc were granted. Denial of certiorari in the instant case will in all likelihood assure that the First Circuit will never again address the question presented.

If this Court believes that there is a reasonable probability that the First Circuit would now defer to the ARB decision in *Spinner*, and wishes to accord the First Circuit an opportunity to decide whether to do so, the Court should grant certiorari, vacate the decision of the court of appeals, and remand the case for further consideration in light of *Spinner*. See *Lawrence v. Chater*, 516 U.S. 163, 167 (1996)(per curiam). The May 2012 ARB decision in *Spinner* is an intervening event occurring subsequent to the February 2012 court of

appeals' decision and the April 2012 denial of rehearing en banc. See *id.* at 168; *Stutson v. United States*, 516 U.S. 163, 180 (Scalia, J., dissenting)(1996). This Court has GVR'd petitions in analogous situations in which the intervening development was persuasive although not necessarily controlling authority[6], on several occasions doing so at the recommendation of the Solicitor General.[7]

If, on the other hand, the Court concludes that there is no reasonable probability that the First Circuit would on remand defer to the ARB decision in *Spinner*, the Court should grant certiorari. Absent a change in the First Circuit's interpretation of section 1514A, decisions in other circuits can only deepen the split, conflicting either with the decision of the First Circuit or with the decision of ARB, while offering no greater development of the merits of the question presented.

(3) The Solicitor General—but not the SEC–argues that it would be "premature" for this Court to resolve whether section 1514A protects employees of

[6] See, e.g., *Mouelle v. Gonzales*, 548 U.S. 901 (2006)(case remanded "for further consideration in light of 71 Fed. Reg. 27,585"); *Long Island Care At Home, Ltd. v. Coke*, 546 U.S. 1147 (2006)(case remanded "for further consideration in light of the Department of Labor's Wage and Hour Advisory Memorandum No. 2005-1"); *Slekis v. Thomas*, 525 U.S. 1098 (1999)(case remanded "for further consideration in light of the interpretive guidance issued by the Health Care Financing Administration on September 4, 1998").

[7] See, e.g., Brief for Respondent, *Mouelle v. Gonzales*, at 26; Brief for the United States as Amicus Curiae, *Long Island Care At Home, Ltd. v. Coke*, at 20.

accounting firms, law firms, and mutual fund advisers. (U.S.Br. 17). If this were 2006, that would be true. After all, back then it appeared that events such as the Enron collapse were isolated aberrations, that the financial markets were strong, that established investment banks like Lehman Brothers were expanding into promising areas, that up and coming banks such as Countrywide Financial were creative innovators, that Fannie Mae and Freddie Mac were backstopping the mortgage industry at no cost to the federal government, that new financial products like collateralized debt obligations and synthetic derivatives were opening exciting low-risk opportunities to investors, and that financial institutions could guard against any unforeseen problems by purchasing insurance from AIG. In 2006 it might not have been important to clarify whether accountants, auditors, lawyers and mutual fund analysts are protected by section 1514A because, after all, there were no serious problems that they could have disclosed. Or so it seemed at the time.

Today we know better. At the cost of millions of jobs, hundreds of billions of taxpayer dollars and enormous investment losses, we have relearned the importance of protecting disclosure of corporate fraud and securities violations. And yet more than a decade after the adoption of Sarbanes Oxley, hundreds of thousands of outside accountants, auditors, lawyers, and mutual fund employees—"many of the employees in the best position to discover and report corporate fraud" (U.S.Br. 7)—still do not know whether section 1514A protects *them* from retaliation for reporting such unlawful actions. At a time when the consequences of

the 2007 financial collapse still reverberate throughout the economy, when the discovery and reporting of corporate misconduct are matters of pressing national concern, resolution by this Court of that critical question would be not premature but exceptionally timely.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the First Circuit. In the alternative, certiorari should be granted, the decision below should be vacated, and the case remanded to the First Circuit for reconsideration in light of the ARB decision in *Spinner v. David Landau and Associates*.

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AMICUS CURIAE BRIEF

No. 12-3

IN THE

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On A Writ Of Certiorari
To The United States Court Of Appeals
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BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. EXTENDING SECTION 806 TO EMPLOYEES OF PRIVATELY HELD CONTRACTORS IS CONTRARY TO SOX'S PURPOSES 4

A. SOX Seeks to Protect Investors Through Targeted Measures That Do Not Burden Small Businesses 4

B. SOX's Purposes Are Not Served by Extending Whistleblower Protection to Employees of Outside Contractors Who Are in No Position to Detect Investor Fraud 9

C. SOX's Objective of Protecting Small Business Would Be Undermined by Subjecting Private Contractors to a New Form of Civil Liability 10

II. THE ARB'S DECISION IN SPINNER IS NOT ENTITLED TO DEFERENCE 15

A. Congress Did Not Grant Exclusive or Even Primary Interpretive Authority to the Secretary 15

TABLE OF CONTENTS
(continued)

Page

B. The ARB's Interpretation Is Contrary to SOX 18

C. The ARB's Interpretation Is Unreasonable 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

CASES

Adams Fruit Co., Inc. v. Barrett,
494 U.S. 638 (1990) 15, 16, 17

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 12

Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.,
474 U.S. 361 (1986) 2, 4

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 12

Brady v. Calyon Sec. (USA),
406 F. Supp. 2d 307 (S.D.N.Y. 2005) 9

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) ..... *passim*

Collins v. Beazer Homes USA, Inc.,
334 F. Supp. 2d 1365 (N.D. Ga. 2004) 13

DeNaples v. Office of Comptroller of Currency,
706 F.3d 481 (D.C. Cir. 2013) 17

Evans v. EPA,
No. 08-059, 2012 WL 3164358
(ARB July 31, 2012) 12

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 3, 5, 6, 18

Fleszar v. U.S. Dep't of Labor,
598 F.3d 912 (7th Cir. 2010) 9

TABLE OF AUTHORITIES
(continued)

Page(s)

Goodman v. Decisive Analytics Corp.,
No. 2006 SOX 11, 2006 WL 3246820
(ALJ Jan. 10, 2006) 9

I.N.S. v. Cardoza-Foncesca,
480 U.S. 421 (1987) 18

Johnson v. The Wellpoint Cos.,
No, 11-035, 2013 WL 1182309
(ARB Feb. 25, 2013) 13, 14

Judulang v. Holder,
132 S. Ct. 476 (2011) 4, 19, 20

Mahony v. Keyspan Corp.,
No. 04 CV 554 SJ, 2007 WL 805813
(E.D.N.Y. Mar. 12, 2007) 13

Martin v. Occupational Safety & Health Review Comm'n,
499 U.S. 144 (1991) 17, 18

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 4, 19

Nat'l Ass'n of Regulatory Utility Com'rs v. ICC,
41 F. 3d 721 (D.C. Cir. 1994) 19, 21

Sequiera v. KB Home,
716 F. Supp. 2d 539 (S.D. Tex. 2009) 13

Spinner v. David Landau & Associates, LLC,
Case Nos. 10-111, 10-115, 2012 WL 1999677
(ARB May 31, 2012) 3, 20

TABLE OF AUTHORITIES
(continued)

Page(s)

Sylvester v. Parexel Int'l,
No. 07-123, 2011 WL 2165854
(ARB May 25, 2011) 12, 14, 15

United States v. Mead Corp.,
533 U.S. 218 (2001) 15, 16

STATUTES

15 U.S.C. § 78j-1 6
15 U.S.C. § 78l 6
15 U.S.C. § 78o-6 6
15 U.S.C. § 78p 6
15 U.S.C. § 7211(c) 6
15 U.S.C. § 7212 6
15 U.S.C. § 7213 6
15 U.S.C. § 7214 6
15 U.S.C. § 7215 6
15 U.S.C. § 7216 6
15 U.S.C. § 7217 6
15 U.S.C. § 7218 6
15 U.S.C. § 7219 6
15 U.S.C. § 7220 6
15 U.S.C. § 7231 6
15 U.S.C. § 7232 6
15 U.S.C. § 7233 6
15 U.S.C. § 7234 6
15 U.S.C. § 7241(a) 6

TABLE OF AUTHORITIES
(continued)

Page(s)

15 U.S.C. § 7245 6

18 U.S.C. § 1514A 8, 9, 16

Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 ..... *passim*

OTHER AUTHORITIES

148 Cong. Rec. S6439 (daily ed. July 9, 2002) 8

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148 Cong. Rec. S7351 (daily ed. July 25, 2002) 7

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OSHA's Whistleblower Investigation Data: FY2005-FY2013 Q3 (2013) http://www.whistleblowers.gov/whistleblower/wb_data_FY05-13-Q3.pdf 11

S. Rep. No. 107-146 (2002) 2, 8

INTEREST OF THE *AMICUS* CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and organizations of every size, in every industry sector, and from every region of the country. A central function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts, including this Court. To that end, the Chamber regularly files *Amicus* briefs in cases that raise issues of vital concern to the nation's business community.

More than 96% of U.S. Chamber members are small businesses with 100 employees or fewer. Petitioners and the Government advance an interpretation of the Sarbanes-Oxley Act of 2002 ("SOX") that would subject these small businesses to burdensome and expensive whistleblower litigation, which is directly contrary to Congress's objective of protecting small businesses.

SUMMARY OF ARGUMENT

SOX is an act intended to "protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws." Pub. L. No. 107-204, 116 Stat. 745. The resulting legislation reflects "hard-fought compromises" on the

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties have filed with the Clerk written blanket consents to the filing of *Amicus* briefs.

best means for effectuating that intent. *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986). In particular, Congress determined that SOX's investor-protection goals are best achieved through targeted measures that do not unduly burden small businesses. This judgment is reflected in Congress's careful approach to the reach of SOX's provisions, including the whistleblower provision at issue here. Through careful drafting, which is tailored as appropriate to each different provision, Congress focused SOX's requirements on public companies and entities that provide specified investor-related services to public companies, thereby excluding from SOX millions of small businesses that do not resort to the capital markets for funding and have no connection to public company investors. *See* S. Rep. No. 107-146, at 10, 13 (2002) (explaining that the purpose of SOX is "to restore confidence in the integrity of the public markets"). This desire to protect small businesses is confirmed through clear contemporaneous statements in the congressional record. Consistent with the foregoing objectives, the whistleblower protection in Section 806 of SOX is limited to employees of public companies, sparing small businesses from the expense of defending against such claims.

Petitioners and the Government, however, urge an unreasonably broad interpretation of Section 806 that would ignore Congress's hard-fought compromises by extending whistleblower coverage to employees of small, privately-held businesses, thereby exposing such businesses to significant liability. Pet'rs' Br. 60; Gov't Br. 22, 23, 28. This sweeping interpretation, which would extend SOX to

reach employees of any private company that contracts with a public company, casts a wide net over employees who have no exposure to investor-related activities and thus could not possibly assist in detecting investor fraud. Extending SOX to reach those employees would not advance SOX's investor-protection goals and would be directly contrary to Congress's objective of protecting small businesses from the costs and burdens of SOX coverage. By focusing on SOX's goals of protecting investors in public companies, without any consideration for Congress's other objective of protecting small businesses from excessive regulatory burdens. Petitioners and the Government "extend[] the scope of the statute beyond the point where Congress indicated it would stop." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

Nor is the Administrative Review Board's ("ARB"'s) interpretation of SOX in *Spinner v. David Landau & Associates, LLC*, Case Nos. 10-111, 10-115, 2012 WL 1999677 (ARB May 31, 2012), entitled to *Chevron* or any other deference. First, although the Secretary of Labor ("Secretary") delegated his adjudicative responsibilities under SOX to the ARB, Congress did not grant the Secretary exclusive or even primary authority to construe SOX's whistleblower provision. To the contrary, by allowing *de novo* review of SOX claims in federal court, and denying the Secretary rulemaking authority, Congress clearly signaled that the Secretary's (and hence the ARB's) interpretations of the Act do not carry the force of law. Second, because Congress has clearly limited the reach of Section 806 to employees of public companies, the ARB's contrary interpretation cannot be upheld. Third, even if the ARB's interpretation were entitled

to deference, it should be rejected as unreasonable because it "fail[s] to consider an important aspect of the problem," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)—namely the impact of expansive coverage on small businesses—and is not tied, "even if loosely, to the purposes of the [laws at issue]," *Judulang v. Holder*, 132 S. Ct. 476, 485 (2011).

ARGUMENT

I. EXTENDING SECTION 806 TO EMPLOYEES OF PRIVATELY HELD CONTRACTORS IS CONTRARY TO SOX'S PURPOSES.

Petitioners and the Government advance a sweeping interpretation of Section 806 that would extend those whistleblower provisions to millions of employees of private contractors and subcontractors; they assert that this interpretation is necessary to achieve SOX's investor-protection goals. Pet'rs' Br. 60; Gov't Br. 22, 23, 28. But Congress's purpose in enacting SOX was not to protect investors at any and all costs and regardless of any competing interest; rather, Congress sought to advance investor protection through those targeted measures that do not unduly burden small businesses. The interpretation advanced by Petitioners and the Government is directly contrary to this objective.

A. SOX Seeks to Protect Investors Through Targeted Measures That Do Not Burden Small Businesses.

A purpose-based interpretation of legislation must take into account congressionally-imposed limitations on the means for achieving the legislation's purposes. *Dimension Fin. Corp.*, 474 U.S. at 373-74. A statute's

broad remedial purposes do not justify "extend[ing] the scope of the statute beyond the point where Congress indicated it would stop." *Brown & Williamson*, 529 U.S. at 161.

In *Brown & Williamson*, this Court held that the FDA lacked the power to regulate tobacco, even if such regulation would promote the FDCA's broad public-health goals. The FDA's attempt to regulate tobacco was inconsistent with the FDCA's more specific objectives of ensuring that products regulated by the FDA are "safe" and "effective." Because the FDA conceded that tobacco cannot be made "safe" and "effective" through regulation, the FDA's attempt to regulate tobacco was inconsistent with key statutory objectives. *Id.* at 133, 134, 140, 142. Just so here, SOX's broad investor-protection goal cannot be achieved through an interpretation that disregards SOX's objective of protecting small businesses from new legislative requirements.

SOX's stated purpose—to "protect investors ... by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws"—focuses on disclosure obligations that apply exclusively to public companies. Pub. L. No. 107-204, 116 Stat. 745. Not surprisingly, then, SOX's substantive provisions use specific language that limits coverage to public companies and those persons and entities whose work directly affects public company investors. For example, Titles III and IV of SOX, which impose enhanced financial disclosure and other requirements, apply only to public companies. The scope of those titles is governed by their repeated use of terms such as

"issuer"[2] or by referring to companies that are "registered under Section 12" or "file reports under Section 15(d)" of the Securities Exchange Act ("Exchange Act"). *See, e.g.*, 15 U.S.C. § 78j-1 (imposing requirements on audit committee of "each issuer"); 15 U.S.C. § 7241(a) (imposing certification requirements on officers of "each company filing periodic reports under section ... 15(a) of the [Exchange Act]" or 15 U.S.C. § 78l); 15 U.S.C. § 78p (imposing disclosure requirements on officers and directors of the issuer of a security "which is registered pursuant to section 12 [of the Exchange Act]"). Other provisions that apply to nonpublic companies do so narrowly by targeting entities that perform public company audits or specified investor-related activities. For example, Titles I and II regulate "public accounting firms that prepare audit reports for issuers, brokers, and dealers." 15 U.S.C. § 7211(c)(1); *see also id.* §§ 7211-7220, 7231-7234. Section 307 of SOX similarly focuses on attorneys "appearing and practicing before the [SEC] in any way in the representation of issuers." *Id.* § 7245. Title V defines codes of conduct for securities analysts who cover public companies. *Id.* § 78o-6. These provisions reflect a measured approach that seeks to restrict coverage to those entities that perform specified investor-related activities and thereby shield other entities from burdensome new legal requirements. *Brown & Williamson*, 529 U.S.

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[2] The term "issuer" is defined as "an issuer (as defined in section 3 of the Securities Exchange Act of 1934 ...), the securities of which are registered under section 12 of that Act ... or that is required to file reports under section 15(d) ..., or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933." 15 U.S.C. § 78j-1.

at 133-34 (determining objectives of a statute by reference to structure and language of statute as a whole).

The legislative history confirms what is apparent from the statutory framework. Senator Sarbanes took special care to clarify that SOX "applies exclusively to public companies—that is, to companies registered with the Securities and Exchange Commission. It is not applicable to the private companies, who make up the vast majority of companies across the country." 148 Cong. Rec. S7351 (daily ed. July 25, 2002). Senator Enzi of Wyoming further noted that Congress had shown restraint by refraining from imposing burdensome new requirements on small businesses. *Id.* at 7354 ("I am pleased to say the actions we took in this bill provide some assurance to small business and small accounting firms that they can continue to operate the way they have in the past.").

When amendments were proposed that would have extended coverage to non-public companies, Senator Dodd of Connecticut rejected those efforts "because ... smaller companies just could not possibly afford the costs associated with that." 148 Cong. Rec. S6494 (daily ed. July 9, 2002). Senator Sarbanes further explained:

> when a company becomes public, you then have an investor interest that has to be protected .... That was the universe we tried to deal with in this legislation. We were very careful that the legislation does not apply to most business in America and does not apply to most accountants in America, since most of them don't audit public companies.

Id.

Consistent with SOX's overarching purposes, Section 806 uses the same language that is used throughout the Act to target public companies and exclude smaller, privately held businesses from its scope. Specifically, Section 806, like numerous provisions throughout the Act, targets companies "with a class of securities registered under section 12" or that are "required to file reports under section 15(d)" of the Exchange Act. 18 U.S.C. § 1514A(a). Only employees of those companies are covered, as evidenced in the language and title of Section 806, "Whistleblower Protection for Employees of Publicly Traded Companies." *See* Resp'ts' Br. 13-24. Similarly, repeated references in the legislative history reflect a clear intent to limit coverage to employees of public companies. *Id.* at 30-37. Section 806 accordingly protects only those employees who, as "corporate insiders," are most likely to be in a position to detect the type of fraud that concerns investors. *See* 148 Cong. Rec. S6439 (daily ed. July 9, 2002) (statement of Sen. Patrick Leahy) ("When sophisticated corporations set up complex fraud schemes, corporate insiders are often the only ones who can disclose what happened and why."); *see also* S. Rep. No. 107-146, at 10, 13 (2002) (explaining that the purpose of Section 806 is to provide "protection" for "insiders" of publicly traded companies who often "are the only firsthand witnesses to [a] fraud"). Nothing in the language or legislative history reflects an intention to extend whistleblower coverage from corporate *insiders* to the employees of privately held *outside* service providers or contractors; and such a result would be entirely at odds with SOX's purposes.

B. SOX's Purposes Are Not Served by Extending Whistleblower Protection to Employees of Outside Contractors Who Are in No Position to Detect Investor Fraud.

Employees of most private contractors will not be in a position to detect fraud on public company investors, and thus providing such employees a new private cause of action will not advance the Act's investor protection goals. Private contractors perform an endless range of functions for public companies, most of which have nothing to do with the public company's core business, much less its audit or accounting functions. Indeed, courts and Department of Labor administrative law judges have uniformly noted that expanding coverage to employees of these private contractors is directly in tension with SOX's more limited focus on protecting investors of public companies. *See, e.g.*, *Fleszar v. U.S. Dep't of Labor*, 598 F.3d 912, 915 (7th Cir. 2010) ("Nothing in § 1514A implies that, if the AMA buys a box of rubber bands from Wal-Mart, a company with traded securities, the AMA becomes covered by § 1514A."); *Brady v. Calyon Sec. (USA)*, 406 F. Supp. 2d 307, 318 (S.D.N.Y. 2005) ("Nothing in the Act suggests that it is intended to provide general whistleblower protection to the employees ... of any privately-held employer, such as a local realtor or law firm, that has ever had occasion, in the normal course of its business, to act as an agent of a publicly traded company, even as to employees who had no relation whatsoever to the publicly traded company."); *Goodman v. Decisive Analytics Corp.*, No. 2006 SOX 11, 2006 WL 3246820, at *8 (ALJ Jan. 10, 2006) (rejecting an interpretation that would cover any

private company that "engages in any contractual relationship with a publicly traded company").

Petitioners and the Government note that some accountants and lawyers at some private firms do have the ability, by virtue of the services they provide, to detect fraud within public companies, and argue that Section 806 should extend to employees of those entities. Pet'rs' Br. 60; Gov't Br. 22, 23, 28. This narrow focus on a limited set of accountants and lawyers to justify a sweeping expansion of coverage to *all* private contractors is deeply flawed. Petitioners and the Government read the statute as covering the employees of all contractors and subcontractors, and they refuse to acknowledge any limiting principles that would require protected activity to relate to fraud within public companies. Thus, Petitioners and the Government allow for the possibility that an employee of a private contractor or subcontractor would be covered, even if his complaint concerns matters entirely internal to his own company that are unrelated to public company activities or investor concerns. Such a broad interpretation is completely untethered to any identifiable statutory purposes and should therefore be rejected.

C. SOX's Objective of Protecting Small Business Would Be Undermined by Subjecting Private Contractors to a New Form of Civil Liability.

The expansive interpretation advanced by Petitioners and the Government would expose thousands of small, privately held companies to costly litigation, which directly undermines SOX's objective of protecting small business from burdensome new requirements. Small, private contractors have limited revenue, too much of which

is already allocated to defending employment-related litigation. Employment-related litigation is one of the most numerous types of litigation for companies of all sizes,[3] and whistleblower claims are on the rise. In 2012, twenty-six percent of companies were subject to whistleblower allegations, up from 22% in 2011.[4] According to the Occupational Safety and Health Administration's ("OSHA"'s) own statistics, since 2008, employees filed more than 1,100 SOX whistleblower cases with OSHA, and the number of claims filed in 2012 increased by approximately 14% from 2011.[5]

The Government contends that expanding Section 806 to millions of employees of private contractors and subcontractors to public companies covered by SOX is nonetheless warranted because the statute "contains built-in limitations." Gov't Br. 23. But the only limitation acknowledged by the Government is SOX's requirement that employees prove that they were "retaliated against because they reported fraud." *Id.* Although this requirement may provide employers with an ultimate defense to whistleblower litigation, it does not protect them from incurring the expense of defending against otherwise meritless claims.

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[3] *See* Fulbright & Jaworski L.L.P., Fulbright's 9th Annual Litigation Trends Survey Report 10 (2013), http:// www.fulbright.com/images/publications/201302269thAnnualLitTrends.pdf.

[4] *See id.* at 32.

[5] *See* OSHA's Whistleblower Investigation Data: FY2005-FY2013 Q3 (2013) 1, http://www.whistleblowers.gov/whistleblower/wb_data_FY05-13-Q3.pdf.

Defending whistleblower cases, particularly in the complex area of securities law, is expensive and time consuming. The expense involved is compounded by recent ARB decisions that create barriers to early dismissal of even non-meritorious claims. For example, the ARB has adopted relaxed pleading standards for SOX whistleblower cases, reasoning that because SOX claims involve "inherently factual issues such as 'reasonable belief' and issues of 'motive,'" they "are rarely suited for Rule 12 dismissals." *Sylvester v. Parexel Int'l*, No. 07-123, 2011 WL 2165854, at *10 (ARB May 25, 2011) (noting that "Rule 12 motions challenging the sufficiency of the pleadings are highly disfavored by the SOX regulations and highly impractical under the Office of Administrative Law Judge (OALJ) rules"). Further, the ARB has held that an employee's SOX whistleblower claim need only provide "fair notice" to the employer of the charges against it, *Evans v. EPA*, No. 08-059, 2012 WL 3164358, at *6 (ARB July 31, 2012), and need not be "facially plausible," as required by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *see Sylvester*, 2011 WL 2165854, at *10; *Evans*, 2012 WL 3164358, at *4-6. Under such lenient administrative pleading standards, even non-meritorious cases must often be defended past any initial motion challenging the sufficiency of the pleading and through discovery, a particularly burdensome endeavor for small, privately held companies.

SOX's "reasonable belief" requirement, as interpreted by the ARB and the courts, imposes further impediments to early dismissal. The concept of "reasonable belief" includes both an objective and

subjective component. The objective component "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Johnson v. The Wellpoint Cos.*, No, 11-035, 2013 WL 1182309, at *9 (ARB Feb. 25, 2013) (citations and internal quotations marks omitted). Relying on the reasonable belief requirement, some courts addressing public company employees have held that a whistleblower need not have an accounting background or any training on securities fraud; for these courts, the need to examine an employee's actual training and background is often an impediment to dismissal of a case based on a pleadings challenge or by summary judgment. *See e.g., Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1376-78 (N.D. Ga. 2004) (denying summary judgment on director of marketing's complaints about overpayments to advertising agency, improper break-down of marketing costs, and suspected kickbacks on lumber purchases); *Mahony v. Keyspan Corp.*, No. 04 CV 554 SJ, 2007 WL 805813, at *1-6 (E.D.N.Y. Mar. 12, 2007) (denying summary judgment where strategic planning director with "neither personal knowledge of the fraud nor the educational background to discover the fraud on his own" could reasonably believe that improperly reported "post-employment benefits" and severance payments constituted shareholder fraud); *Sequiera v. KB Home*, 716 F. Supp. 2d 539, 551-52 (S.D. Tex. 2009) (denying summary judgment where marketing manager without "any formalized training in accounting or Sarbanes-Oxley compliance," could have reasonable belief of shareholder fraud based on company's acceptance of false vendor invoices,

improper transfer of inventory, and direction for him to destroy budget data). Applying this broad interpretation, the ARB has found that "the issue of 'objective reasonableness' involves factual issues and cannot be decided in the absence of an adjudicatory hearing." *Sylvester*, 2011 WL 2165854, at *12.

The subjective reasonableness determination poses similar challenges to pre-hearing dismissal. "To satisfy subjective reasonableness, the employee must actually have possessed the belief that the conduct he complained of constituted a violation of relevant law." *Johnson*, 2013 WL 1182309, at *9 (citations and quotations omitted). But as the ARB has interpreted this requirement, because the employee need not convey reasonableness of their belief to management or other authorities, *Sylvester*, 2011 WL 2165854, at *12; *Johnson*, 2013 WL 1182309, at *9, the subjective component of the reasonable belief standard must be fully investigated and may turn on the credibility of the employee, often rendering it unsuitable for summary adjudication.

Moreover, the ARB's recent decisions have opened the floodgates to a broad range of claims by construing the "protected activity" requirement broadly. The ARB has held that an employee need not describe an actual violation of the law to obtain whistleblower status. *Sylvester*, 2011 WL 2165854, at *12-13. Further, an employee need not show that allegedly protected activities "have a sufficiently definitive and specific relationship to any of the listed categories of fraud or securities violations"; instead, he need only show that he reported conduct that he reasonably believed to be related to one of the enumerated violations. *Id.* at *14-15. Moreover, the

ARB has held that shareholder or investor fraud is not required to establish SOX-protected activity. *Sylvester*, 2011 WL 2165854, at *15. These decisions open the door to extended litigation over employee concerns that are entirely unrelated to the investor-protection purposes of the Act. Such a result, which is to some extent inevitable in any anti-retaliation regime that protects an employee's "reasonable belief," demonstrates why Congress was careful not to burden private companies with litigation against their own employees under Section 806.

II. THE ARB'S DECISION IN *SPINNER* IS NOT ENTITLED TO DEFERENCE

A. Congress Did Not Grant Exclusive or Even Primary Interpretive Authority to the Secretary.

The language and structure of SOX make clear that Congress did not intend ARB decisions to receive deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). "A precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649 (1990). "[A] very good indicator of delegation meriting *Chevron* treatment [is] express congressional authorization[] to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

Although Congress authorized the Secretary to conduct adjudications, no "plausible case can be made that Congress would want such a delegation to mean that [the agency] enjoy[s] primary interpretational

authority." *Id.* at 229 n.11 (citation and quotations omitted). Indeed, Congress imparted upon federal district courts original jurisdiction over private actions brought pursuant to Section 806, specifically authorizing *de novo* review of those claims. 18 U.S.C. § 1514A(b)(1)(B). Where Congress provides litigants with "direct recourse to federal court where their rights under the statute are violated," the agency's interpretation of the scope of statutory enforcement provisions is not entitled to deference. *Adams Fruit Co.*, 494 U.S. at 650.

In *Adams Fruit Co.*, the Court refused to defer to the Department of Labor's interpretation of "the scope of judicial power" vested by the Migrant and Seasonal Agricultural Worker Protection Act ("MWPA") because the MWPA provides aggrieved farm workers with direct recourse to federal court for violations of the act. Through the MWPA, Congress authorized the Secretary to promulgate standards implementing the act, but adjudicative authority—and thus authority to interpret the statute's enforcement provisions—rested exclusively in the federal courts. *See id.* Because only those agency determinations that fall within the scope of its interpretive authority are entitled to deference, the Department of Labor's interpretation of the MWPA was not so entitled. *Id.*

Here, as in *Adams Fruit Co.*, Congress granted the federal courts the independent authority to hear *de novo* actions filed under Section 806,[6] thereby vesting

[6] Because a complaining employee may seek review of his claims where "the Secretary has not issued a final decision within 180 days of the filing of the complaint," 18 U.S.C. § 1514A(b)(1)(B), a complainant may file suit in the district court before OSHA has completed its investigation.

the courts with power to interpret Section 806's enforcement provisions. The fact that the ARB shares adjudicative authority with the federal district courts is of no moment,[7] because, as Respondents note (Br. 52) the agency adjudicative process is usually not mandatory. Under Section 806, the ability to seek review in federal court is conditioned on the passage of time rather than the issuance of a final decision, and may occur even prior to the issuance of any decision at all. Because federal courts retain primary interpretive authority, deference to the ARB's interpretation of Section 806 is not warranted.

Unlike in *Adams Fruit Co.*, the administrative body here—the ARB—has no rulemaking authority, further militating against a grant of deference. "[A]gency adjudication is a generally permissible mode of law-making and policymaking only because the unitary agencies," have also "been delegated the power to make law and policy through rulemaking." *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 154 (1991). Unlike the Federal Trade Commission, the Securities and Exchange Commission, and the Federal Communications Commission, the ARB has not been granted rulemaking power. Because Congress elected not to confer upon the ARB any rulemaking authority, its interpretations of SOX through

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[7] By analogy, where interpretive authority is split among two or more agencies, deference to a single agency's statutory interpretation is unwarranted. *See, e.g., DeNaples v. Office of Comptroller of Currency*, 706 F.3d 481, 487 (D.C. Cir. 2013) ("Justifications for [*Chevron*] deference begin to fall when an agency interprets a statute administered by multiple agencies.").

adjudication are not entitled to deference. *Id.* ("Insofar as Congress did not invest the [agency] with the power to make law or policy by other means, we cannot infer that Congress expected the [agency] to use its adjudicatory power to play a policymaking role.").

B. The ARB's Interpretation Is Contrary to SOX.

The ARB's decision is not entitled to deference for the separate and independent reason that it is inconsistent with the text of SOX. Under *Chevron*, where Congress has clearly addressed the interpretive question at issue, the courts must reject a contrary agency interpretation. 467 U.S. at 843; *see I.N.S. v. Cardoza-Foncesca*, 480 U.S. 421, 448-450 (1987)(applying *Chevron* to agency adjudication).

Instructive here is *FDA v. Brown & Williamson Tobacco Corp.*, where this Court held that a statute's specific objectives of ensuring a product is "safe" and "effective" precluded an interpretation by the FDA that was based on the statute's broad remedial goals. In *Brown & Williamson*, this Court held that the FDA lacked the power to regulate tobacco, even if such regulation would promote the FDCA's broad public-health goals. The FDA's attempt to regulate tobacco was inconsistent with the FDCA's more specific objectives of ensuring that FDA-regulated products are "safe" and "effective." Because the FDA conceded that tobacco cannot be made "safe" and "effective" through regulation, the FDA's attempt to regulate tobacco was inconsistent with key statutory objectives. Finding clear congressional intent to exclude tobacco products from the FDA's jurisdiction, this Court rejected FDA's assertion to the contrary.

Likewise here, Congress's objective of excluding small, privately owned businesses from SOX coverage pervades the text, structure and legislative history of the Act. Because Congress has clearly spoken on the scope of Section 806's coverage, the ARB's contrary interpretation should be set aside.

C. The ARB's Interpretation Is Unreasonable.

Even if the term "employee" in Section 806 is ambiguous, a point *Amicus* does not concede, the ARB's interpretation is not entitled to *Chevron* deference because the ARB has failed to advance a reasonable explanation for its interpretation. *Chevron*, 467 U.S. at 845 ("If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care . . . we should not disturb it.") (citation omitted).

> [A]n agency [policy decision is] arbitrary and capricious if the agency ... entirely failed to consider an important aspect of the problem, ... or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S., Inc., 463 U.S. at 43; *see also Judulang v. Holder*, 132 S.Ct. 476, 484 n.7 (2011) (noting that "under *Chevron* step two, we ask whether an agency interpretation is 'arbitrary or capricious in substance'"); *Nat'l Ass'n of Regulatory Utility Com'rs v. ICC*, 41 F. 3d 721, 726 (D.C. Cir. 1994) ("[T]he inquiry at the second step of *Chevron* overlaps analytically with a court's task under the Administrative Procedure Act (APA) ... in determining whether agency action is arbitrary and capricious (unreasonable)."). Even where an agency has "legitimate reasons" for its action, it must act in

"some rational way" and the action "must be tied, even if loosely, to the purposes of the [laws at issue]." *Judulang*, 132 S. Ct. at 485.

Here, the ARB's interpretation of Section 806 completely overshoots the Act's purposes by extending coverage to millions of small businesses whose employees could not possibly advance SOX's investor-protection goals. *See* discussion *supra* 9-10. This sweeping interpretation is not "tied, even loosely" to the Act's investor-protection goals. *Id.* And the ARB's interpretation completely disregards Congress's objectives of protecting small businesses from coverage. The ARB acknowledges Congress's desire to "assuage the concerns of small private companies worried about the burden of SOX's regulatory regime," but concludes that these concerns apply only to SOX's "comprehensive accounting requirements" and not to its whistleblower provision. *Spinner*, 2012 WL 1999677, at *9 (ARB May 31, 2012). This blithe conclusion ignores an important Congressional objective that pervades the entire Act. As discussed *supra* 5-6, Congress's concerns for small businesses are reflected not only in SOX's accounting provisions, but also in Congress's drafting approach to each and every provision of the Act. This careful and pervasive drafting approach, when taken together with references in the congressional record, makes it entirely unreasonable to assume, as the ARB does, that Congress's concerns for small businesses extend only to the Act's "accounting requirements." *Id.* By refusing to consider all of SOX's purposes, the ARB fails to reach "a reasonable accommodation of conflicting policies that were committed to the agency's care" and thus fails the *Chevron* deference test. *Chevron*, 467 U.S. at 845;

Nat'l Ass'n of Regulatory Utility Com'rs, 41 F. 3d at 728 (finding that agency acted unreasonably in favoring one objective of a statute in a way that undermined another objective "whether one considers the case as one involving a question of *Chevron* Step II statutory interpretation or a garden variety arbitrary and capricious review or, as we do, a case that overlaps both administrative law concepts").

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

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JACKIE HOSANG LAWSON AND JONATHAN M. ZANG,
Petitioners,

v.

FMR, LLC, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. UNDER THE PLAIN LANGUAGE OF THE STATUTE, EMPLOYEES OF PRIVATE COMPANIES ARE NOT COVERED BY SECTION 806 OF THE SARBANES-OXLEY ACT	6
II. THE DEPARTMENT OF LABOR'S FLAWED INTERPRETATION OF THE SCOPE OF SECTION 806 IS NOT ENTITLED TO DEFERENCE	12
A. *Chevron* Deference Does Not Apply When The Statute Is Clear	12
B. Even If The Statute Were Unclear, Congress Did Not Authorize The Department Of Labor To Make Substantive Law Under Section 806 To Fill The Gap	14
III. THIS COURT SHOULD NOT DEFER TO ADMINISTRATIVE RULINGS BROADENING THE SCOPE OF STATUTORY COVERAGE ABSENT CLEAR DIRECTION FROM CONGRESS	16
CONCLUSION	22

TABLE OF AUTHORITIES

FEDERAL CASES Page(s)

American Ship Building Co. v. NLRB, 380 U.S. 300 (1965) 18

Auer v. Robbins, 519 U.S. 452 (1997) 14

Campbell v. United States Department of Justice, 164 F.3d 20 (D.C. Cir. 1998) 18

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) .....*passim*

City of Arlington, Texas v. FCC, __ U.S. __, 133 S. Ct. 1863 (2013) 13, 21

Department of the Treasury, Internal Revenue Service v. Federal Labor Relations Authority, 494 U.S. 922 (1990). 18

Dole v. United Steelworkers, 494 U.S. 26 (1990) 13

EEOC v. Freeman, 2013 BL 210284 (D. Md. August 9, 2013) 19

EEOC v. Kaplan Higher Learning Education Corp., 2013 BL 21834 (N.D. Ohio January 28, 2013) 20

Fleszar v. United States Department of Labor, 598 F.3d 912 (7th Cir. 2010) 12

Holly Farms Corp. v. NLRB, 517 U.S. 392 (1996) 18

Immigration & Naturalization Service v. Aguirre-Aguirre, 526 U.S. 415 (1999) 14

NLRB v. Brown, 380 U.S. 278 (1965) 18

TABLE OF AUTHORITIES—Continued

Page(s)

Owen v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013) 21

Richards v. Ernst & Young, LLP, 2013 BL 222217 (9th Cir. August 21, 2013) 21

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 16

Sutherland v. Ernst & Young, LLP, 2013 BL 211217 (2d Cir. August 9, 2013) 21

United States v. Mead Corp., 533 U.S. 218 (2001) 13

FEDERAL AGENCY DECISIONS

D.R. Horton, 357 N.L.R.B. No. 184 (Jan. 3, 2012) 20, 21

OFCCP v. Cargill Meat Solutions, No. 2012-OFC-00001 (OALJ August 15, 2013) 20

OFCCP v. VF Jeanswear, L.P., No. 2011-OFC-00006 (OALJ August 5, 2013) 20

Spinner v. David Landau and Associates, LLC, ARB Nos. 10-111, 10-115 (ARB May 31, 2012) ..... *passim*

FEDERAL STATUTES

15 U.S.C. § 7211(a) 7

18 U.S.C. § 1513 10

49 U.S.C. § 42121(b)(5) 16

TABLE OF AUTHORITIES—Continued

Page(s)

Age Discrimination in Employment Act,
29 U.S.C. §§ 621 *et seq.* 2

Americans with Disabilities Act,
42 U.S.C. §§ 12101 *et seq.* 2

Equal Pay Act,
29 U.S.C. § 206(d) 2

Fair Labor Standards Act,
29 U.S.C. §§ 201 *et seq.* 3
29 U.S.C. § 213 14

Family and Medical Leave Act,
29 U.S.C. §§ 2601 *et seq.* 3

Genetic Information Nondiscrimination Act,
42 U.S.C. §§ 2000ff *et seq.* 2, 3

Section 503 of the Rehabilitation Act of 1973,
29 U.S.C. § 793 3

Section 806 of the Sarbanes-Oxley Act of 2002,
18 U.S.C. § 1514A ..... *passim*
18 U.S.C. § 1514A(a) 7, 8, 10
18 U.S.C. § 1514A(b) 15
18 U.S.C. § 1514A(b)(2)(A) 6, 15, 16

Securities Exchange Act of 1934,
15 U.S.C. § 78o(d) 4

TABLE OF AUTHORITIES—Continued

Page(s)

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* 2, 18, 19
42 U.S.C. § 2000e-12(a) 19

Vietnam Era Veterans' Readjustment Assistance Act, 38 U.S.C. §§ 4211 *et seq.* 3

FEDERAL REGULATIONS

41 C.F.R. ch. 60 3

69 Fed. Reg. 52,104 (August 24, 2004) 15

LEGISLATIVE HISTORY

148 Cong. Rec. S1787 (daily ed. March 12, 2002) 11, 12

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929A, 124 Stat. 1376 (2010) ... 8, 9

Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745 (2002) 6

OTHER AUTHORITIES

EEOC Enforcement Guidance, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (EEOC April 25, 2012) 19

Executive Order 11,246, 30 Fed. Reg. 12,319 (September 24, 1965) 3

IN THE

Supreme Court of the United States

No. 12-3

JACKIE HOSANG LAWSON AND JONATHAN M. ZANG,
Petitioners,

v.

FMR, LLC, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*.[1] The brief supports the position of Respondents before this Court and thus urges affirmance of the decision below.

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes nearly 300 major U.S. corporations collectively employing close to twenty million people. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, implications of fair employment laws and policies. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Most of EEAC's member companies are publicly traded companies subject to Section 806 of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. § 1514A, and thus are potential respondents to whistleblower complaints filed under the Act. Some are not covered by Section 806 but do business with covered companies and thus would be covered were the decision below to be reversed.

Moreover, all of EEAC's member companies are subject to varying levels of regulation and enforcement by myriad federal agencies. For instance, all of EEAC's member companies are employers subject to the federal employment nondiscrimination statutes enforced by the U.S. Equal Employment Opportunity Commission (EEOC): Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*; the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*; the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*; the Equal Pay Act (EPA), 29 U.S.C. § 206(d); and the Genetic Information

Nondiscrimination Act (GINA), 42 U.S.C. §§ 2000ff *et seq.* They are also covered by the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, and the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 *et seq.*, both of which are enforced by the U.S. Department of Labor's Wage and Hour Division. Most EEAC members also are federal government contractors subject to the affirmative action requirements of Executive Order 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965), as amended, and the implementing regulations under 41 C.F.R. ch. 60; Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793; and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), 38 U.S.C. §§ 4211 *et seq.* Those requirements are enforced by the U.S. Department of Labor's Office of Federal Contract Compliance Programs.

Accordingly, the issue presented in this case is extremely important to the nationwide constituency that EEAC represents. The U.S. Court of Appeals for the First Circuit ruled correctly that under the plain language of the statute, Section 806 covers only employees of public companies, and thus does not provide a cause of action to employees of a private firm merely because that firm does business with a public company. Petitioners and the United States as *amicus curiae* contend, incorrectly, that because the U.S. Department of Labor's Administrative Review Board (ARB) opined in *Spinner v. David Landau and Associates, LLC*, ARB Nos. 10-111, 10-115 (ARB May 31, 2012), that Section 806 does cover employees of private firms, courts must defer to that pronouncement. This Court's ruling on the issue of whether and when a court must defer categorically to statutory misinterpretations by federal agencies therefore will have a substantial impact on EEAC's members.

Because of its significant experience in these matters, EEAC is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioners were employed by private companies that provide investment advisory and other services to the Fidelity family of mutual funds. Pet. App. 4a. The Fidelity mutual funds, in turn, are separate investment companies that are required to file reports under section 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(d), and thus are covered by Section 806 of the Sarbanes-Oxley Act of 2002 (SOX), codified at 18 U.S.C. § 1514A. *Id.* They are owned by their shareholders and are not affiliated with Petitioners' employers except by contract. *Id.*

Petitioners claim that their employers retaliated against them for allegedly "blowing the whistle" in violation of Section 806. Pet. App. 183a. Both sued their employers and the common parent company, FMR, LLC, in federal court. Pet. App. 77a. Respondents asked the trial court to dismiss their claims on the ground, among others, that Petitioners were not covered employees under Section 806 because FMR, LLC, and its subsidiaries were private companies. Pet. App. 83a, 87a. The trial court denied the motions to dismiss, holding that the SOX whistleblower protection provisions extend to employees of private agents, contractors, and subcontractors of public companies. Pet. App. 8a. FMR sought and was granted interlocutory review by the First Circuit. Pet. App. 8a–9a.

The First Circuit reversed, holding that the SOX whistleblower retaliation provisions protect only the

employees of public companies. Pet. App. 51a-52a. In contrast, the U.S. Department of Labor (DOL) Administrative Review Board (ARB), overruling an administrative law judge, read the statute as covering employees of private companies. *Spinner v. David Landau and Assocs., LLC*, ARB Nos. 10-111, 10-115 (ARB May 31, 2012). Petitioners and the United States now contend that under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), decisions of the ARB interpreting Section 806, including *Spinner*, are entitled to deference from the courts. *Brief of the United States as Amicus Curiae Supporting Petitioners* at 9-11.

SUMMARY OF ARGUMENT

As the First Circuit correctly held, the plain language of Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, does not cover employees of private companies. The actual statutory language itself, as well as the titles and captions accompanying the original statute, all limit the coverage of the law to employees of public companies, *i.e.*, those with a class of securities registered under section 12 of the Securities Exchange Act of 1934 or those that file reports with the Securities and Exchange Commission pursuant to section 15(d) of the 1934 Act. 18 U.S.C. § 1514A.

Accordingly, the framework this Court established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, for analyzing agency interpretations where the underlying statute is silent or ambiguous simply does not apply to this case, since the statutory language is clear. 467 U.S. 837, 842-43 (1984). Moreover, even if the statutory language were ambiguous, Congress did not give the Department of

Labor the authority to create substantive law to fill the gap. Rather, Congress gave the Labor Department only enough authority to make an administrative determination as to whether or not the statute has been violated in a particular case; the agency must go to federal court to seek judicial enforcement of its decision. 18 U.S.C. § 1514A(b)(2)(A) (incorporating by reference 49 U.S.C. § 42121(b)).

This court should not afford unbridled deference to administrative rulings that broaden the scope of statutory coverage. *Chevron* does not go so far as to mandate that courts rubber-stamp an agency's statutory interpretation. Indeed, the absence of meaningful judicial review would leave the regulated community twisting in the ever-changing political winds.

ARGUMENT

I. UNDER THE PLAIN LANGUAGE OF THE STATUTE, EMPLOYEES OF PRIVATE COMPANIES ARE NOT COVERED BY SECTION 806 OF THE SARBANES-OXLEY ACT

As the First Circuit below correctly ruled, Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, does not cover employees of privately held companies. Accordingly, the decision below should be affirmed.

Congress enacted the Sarbanes-Oxley Act (SOX), Pub. L. No. 107-204, 116 Stat. 745 (2002), in the wake of several highly-publicized scandals involving fraud at publicly-traded companies. Among other things, the law imposes on publicly traded companies certain corporate responsibility and financial disclosure requirements. The law also established a Public

Company Accounting Oversight Board "to oversee the audit of companies that are subject to the securities laws ...." 15 U.S.C. § 7211(a).

Section 806(a) of SOX created 18 U.S.C. § 1514A, which in turn established a new cause of action prohibiting whistleblower retaliation by publicly traded companies against covered individuals who engage in one or more of the listed protected activities. As originally enacted, § 1514A provided:

> WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES. No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. [§] 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. [§] 78o(d)) ... , or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

with regard to any of the listed protected activities. 18 U.S.C. § 1514A(a). The protected activities are:

> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating

> to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—
>
> (A) a Federal regulatory or law enforcement agency;
>
> (B) any Member of Congress or any committee of Congress; or
>
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
>
> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

Id.

As part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Congress amended Section 806(a) in 2010 to also cover the employees of subsidiaries of publicly traded companies as follows:

> SEC. 929A. PROTECTION FOR EMPLOYEES OF SUBSIDIARIES AND AFFILIATES OF PUBLICLY TRADED COMPANIES.
>
> Section 1514A of title 18, United States Code, is amended by inserting "including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such

> company" after "the Securities Exchange Act of 1934 (15 U.S.C. [§] 78o(d))".

Pub. L. No. 111-203, § 929A, 124 Stat. 1376, 1852 (2010).

As the First Circuit correctly discerned, the plain language of Section 806 covers only employees of public companies[2] and not those that are privately held. The court below pointed out that:

> The text of § 1514A(a) first identifies covered employers: those with a class of securities registered under section 12 of the 1934 Act or those that file reports with the SEC pursuant to section 15(d) of the 1934 Act. Such public companies may not retaliate against their own employees who engage in protected activity. Section 1514A(a) then enumerates a list of representatives of such employers, including those who are contractors or subcontractors, and they are also barred from retaliating against employees of the covered public-company employer who engage in protected activity.

Pet. App. 17a-18a (footnote omitted). It explained, "Section 1514A(a)'s list of company representatives serves ... to ensure an employee of a public company is covered under the provision if he or she were harassed by officers, other employees, or contractors or subcontractors to the public company for reporting fraud in that public company." Pet. App. 18a (footnote omitted).

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[2] As did the First Circuit, we use the term "public companies" as shorthand for both categories of coverage under Section 806, *i.e.*, those with a class of securities registered under section 12 of the 1934 Act or those that file reports with the SEC pursuant to section 15(d) of the 1934 Act. Pet. App. 13a.

As the First Circuit observed further, Congress in describing both Section 806 and 18 U.S.C. § 1514A(a) made clear that those provisions were intended to extend only to employees of public, not privately held, companies. Section 806 is entitled, "Protection for Employees of *Publicly Traded* Companies Who Provide Evidence of Fraud." Pet. App. 19a (emphasis added). Similarly, § 1514A is captioned "Whistleblower protection for employees of *publicly traded* companies." Pet. App. 20a (emphasis added). The manner in which Congress elected to describe these provisions strongly suggests that it intended to cover only employees of public companies and never contemplated covering those of private companies. Indeed, as the First Circuit concluded, given this language, it would be genuinely "odd to read § 1514A(a) as covering employees of private companies." Pet. App. 19a. Thus, the title of Section 806 and the caption of § 1514A further underscore the plain meaning of the actual statutory language.

Moreover, as the First Circuit observed, where Congress wanted to extend broader coverage in SOX, it did so, using broader language. Pet. App. 22a-25a. Elsewhere in SOX, Congress explicitly created broader whistleblower protection, making the language of Section 806 "conspicuously narrow" in comparison. *Id.* at 24a. For example, Section 1107, entitled "Retaliation Against Informants," adds language to 18 U.S.C. § 1513 providing that

> (e) *Whoever* knowingly, with the intent to retaliate, takes *any action* harmful to *any person*, including interference with the lawful employment or livelihood of *any person*, for providing to

> a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

SOX § 1107, 116 Stat. at 810 (emphasis added). Pet. App. 23a-24a. As the First Circuit pointed out, "This language requires neither a public company, nor an employment relationship, nor a securities law violation to trigger coverage." Pet. App. 24a.

In addition, the First Circuit related the many instances in which the legislative history both of Section 806 and the Dodd-Frank amendment further confirms that all along, Congress has intended Section 806 to cover only employees of public companies. Pet. App. 37a-42a. One example is the Senate Judiciary Committee report on the Corporate and Criminal Fraud Accountability Act of 2002, S. 2010, 107th Cong. (2002), which contained the provision that would become § 1514A. Pet. App. 38a (citation omitted). That report states that the future § 1514A "would provide whistleblower protection to employees of publicly traded companies," and that it would "provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company." *Id.* (citations omitted).

Further, in remarks introducing that legislation, Senator Leahy stated that "Section 7 of the bill would provide whistleblower protection to employees of *publicly traded* companies who report acts of fraud to Federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company." 148 Cong. Rec.

S1787-88 (daily ed. Mar. 12, 2002) (Statement of Sen. Leahy). He continued that "[a]lthough current law protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for employees of publicly traded companies who blow the whistle on fraud and protect investors." *Id.* at S1788.

As the Seventh Circuit has observed, it simply cannot be that the phrase "'contractor, subcontractor, or agent' means anyone who has *any* contract with an issuer of securities. Nothing in § 1514A implies that, if the [employer] buys a box of rubber bands from Wal-Mart, a company with traded securities, the [employer] becomes covered by § 1514A.'" *Fleszar v. U.S. Dep't of Labor*, 598 F.3d 912, 915 (7th Cir. 2010).

Therefore, as the First Circuit correctly found, the plain language of Section 806 covers only employees of public companies.

II. THE DEPARTMENT OF LABOR'S FLAWED INTERPRETATION OF THE SCOPE OF SECTION 806 IS NOT ENTITLED TO DEFERENCE

A. *Chevron* Deference Does Not Apply When The Statute Is Clear

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court established the fundamental framework for analyzing certain situations in which a party challenges a federal agency's construction of a statute. Notably, the *Chevron* framework does not apply to judicial review of all agency actions, but only to those for which "it appears that Congress delegated authority to the agency generally to make rules carrying the force of

law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Where such is not the case, the *Chevron* framework does not apply, and the agency's view is, at most, "eligible to claim respect according to its persuasiveness." *Id.* at 221 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

Where the *Chevron* framework does apply, there are, the Court explained, "two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43 (footnote omitted). However, "if the statute is silent or ambiguous with respect to the specific issue," then "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843 (footnote omitted).

Congress has spoken directly to the precise question at issue, both in the statutory text and in the title and caption of Section 806 and § 1514A. Congress left no "gap" for the agency to fill. *Cf. Chevron*, 467 U.S. at 843. Thus, there is no room whatsoever for agency interpretation. "Where Congress has established a clear line, the agency cannot go beyond it ...." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1874 (2013). *See also Dole v. United Steelworkers*, 494 U.S. 26, 42 (1990) (concluding that "[b]ecause we find that the statute, as a whole, clearly expresses Congress' intention, we decline to defer to OMB's interpretation") (footnote omitted). Rather, as the Court said in *Chevron*, "that is the end of the matter." 467 U.S. at

842. The agency's interpretation is due no deference under *Chevron*.

B. Even If The Statute Were Unclear, Congress Did Not Authorize The Department Of Labor To Make Substantive Law Under Section 806 To Fill The Gap

Moreover, even if the statutory language were ambiguous, Congress did not give the Department of Labor (DOL) the rulemaking authority to fill the gap. *Cf. Immigration & Naturalization Serv. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (affording *Chevron* deference to the Immigration and Naturalization Service because the statute in question specifically charged the Attorney General "with the administration and enforcement of the statute" and stated that "the determination and ruling by the Attorney General with respect to all questions of law shall be controlling") (quoting 8 U.S.C. § 1103(a)(1) (1994 ed., Supp. III)). Unlike, for example, the exemptions provision of the Fair Labor Standards Act, 29 U.S.C. § 213, Congress in Section 806 did not give the Department of Labor "broad authority to 'defin[e] and delimi[t]' the scope of the" statutory language in question. *Auer v. Robbins*, 519 U.S. 452, 456 (1997) (quoting 29 U.S.C. § 213(a)(1), which refers to certain statutory terms "as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]").

In the court below, the Department of Labor conceded that it did not have substantive rulemaking authority with respect to Section 806. Pet. App. 49a. Quite appropriately, then, in promulgating procedural regulations governing the complaint process, it stated

that "[t]hese rules are not intended to provide [statutory] interpretations ...." 69 Fed. Reg. 52,104, 52,105 (Aug. 24, 2004).

Nevertheless, the Government now claims that the Labor Department *does* have the authority to make law under Section 806, and in particular that the decision of the Department of Labor's Administrative Review Board (ARB) in *Spinner v. David Landau and Associates, LLC*, ARB Nos. 10-111, 10-115 (ARB May 31, 2012), holding that Section 806 covers employees of private companies, is due *Chevron* deference from this and every other federal court. *Brief of the United States as Amicus Curiae Supporting Petitioners* at 9-11. In the Government's view, Section 806 is actually ambiguous, and because Congress gave the Secretary of Labor the authority to determine whether a violation has occurred, which authority the Secretary has delegated to the Administrative Review Board (ARB), the decisions of the ARB are due *Chevron* deference. *Id.*

Section 806 does provide for use of the DOL administrative process by an individual who claims that he or she has been retaliated against for whistleblowing in violation of the law, but with resort to the federal courts for de novo review if the agency has not issued a final decision within 180 days of the complaint. 18 U.S.C. § 1514A(b). And Section 806 also provides for judicial review by the U.S. courts of appeals on petition of any person adversely affected or aggrieved by the agency's order. 18 U.S.C. § 1514A(b)(2)(A) (incorporating by reference 49 U.S.C. § 42121(b)). Indeed, Section 806 does not even provide DOL with full enforcement authority. Rather, DOL must take its order to federal court in an enforcement action. Section 806 states that actions shall be

governed under the rules and procedures set forth in 49 U.S.C. § 42121(b). 18 U.S.C. § 1514A(b)(2)(A). Under that provision, "Whenever any person has failed to comply with [the Secretary's] order ... the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order." 49 U.S.C. § 42121(b)(5).

Thus, the ARB's interpretation that Section 806 covers employees of private companies is not due any deference from this or any Court.[3]

III. THIS COURT SHOULD NOT DEFER TO ADMINISTRATIVE RULINGS BROADENING THE SCOPE OF STATUTORY COVERAGE ABSENT CLEAR DIRECTION FROM CONGRESS

The Government's position in this case is profoundly disturbing. If an agency that Congress has provided with only limited enforcement authority nevertheless can make substantive statutory interpretations in individual cases that are essentially unreviewable because a reviewing court must defer to the agency's *ipse dixit*, then judicial review in such cases is meaningless. The Government's position appears to be that where an agency such as DOL is tasked with the responsibility of handling individual complaints under an individual rights statute, any pronouncement of the administrative appeals board that hears appeals from an administrative law judge as to the

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[3] Nor is the ARB's decision in *Spinner* entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Skidmore* deference is appropriate only if the agency action has the "power to persuade," *id.* at 140, which *Spinner* does not, since it is contrary to the plain language of the statute.

scope of statutory coverage is unassailable, and a reviewing court has no option but to rubber-stamp the outcome.

The instant case is a prime example of why the Government's position must be rejected. Despite clear statutory language to the contrary, the Government contends that this Court must defer to the decision of the ARB in *Spinner*, which extends Section 806 well beyond the parameters established by Congress, to cover the employees of hundreds if not thousands of private companies who are not within the scope of the law. And in the Government's view, this Court's hands are tied by its own prior decisions and it can do nothing but defer to the ARB's erroneous interpretation.

The Government's position comes perilously close to maintaining that this Court has delegated all issues of statutory interpretation to the administrative branch, leaving the federal courts with no real review authority. If the Government is correct, then all an agency has to do is to declare that it has found silence or ambiguity in the statutory language, perhaps because the statute does not say what the agency wants it to say. Then it can announce its own vision, however fanciful, argue that it is a plausible construction of the statute, and claim *Chevron* deference.

The Government is simply incorrect as to how the *Chevron* framework works. Even if the *Chevron* framework applies, and even if the answer to the first *Chevron* question is that the statute is silent or ambiguous, then the second *Chevron* question still demands a response: "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843 (footnote omitted). This too is a meaningful inquiry. Where the agency's construction is unreasonable, *Chevron* authorizes courts to

reject it. *Dep't of the Treasury, Internal Revenue Serv. v. Fed. Labor Relations Auth.*, 494 U.S. 922, 928 (1990) (applying *Chevron* framework and rejecting agency interpretation as "not reasonable"). "[D]eference is not equivalent to acquiescence ...." *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998). *See NLRB v. Brown*, 380 U.S. 278, 291-92 (1965) ("Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions"); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965) ("The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress"), *quoted in Holly Farms Corp. v. NLRB*, 517 U.S. 392, 410 (1996) (O'Connor, J., concurring in the judgment in part and dissenting in part).

If the Government's position were to prevail in this case, then agencies would be free to invent, misconstrue, imagine and implement statutory construction that exceeds, perhaps even intentionally, the boundaries imposed by Congress when it enacted the statute, and judicial review would be merely a check-off rather than a check.

The field of employment law at the moment is rife with examples of agency overreach. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, which prohibits discrimination in employment on the basis of race, color, religion, sex or national origin,

does not bar employers from conducting criminal background checks or credit history checks of prospective employees. Nevertheless, the Equal Employment Opportunity Commission (EEOC), which lacks the authority to promulgate substantive regulations interpreting Title VII,[4] has of late been on a mission to ban criminal background checks and credit history checks from the private sector employment process in all but a few very limited circumstances. EEOC Enforcement Guidance, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (EEOC Apr. 25, 2012).[5] So far, two EEOC lawsuits attempting to push this agenda by contending that company policies of conducting criminal and/or credit background checks produce an unlawful disparate impact on protected classes have been thrown out by federal judges, in part because the agency's purported statistical evidence was so badly flawed. *EEOC v. Freeman*, 2013 BL 210284, at *1, *11 (D. Md. Aug. 9, 2013) (finding that the EEOC's expert had engaged in "cherry-pick[ing]" of data to arrive at the results he sought, and that his database contained a "mind-boggling number of errors," and noting that "[f]or many employers, conducting a criminal history or credit record background check on a potential employee is a rational and legitimate component of a reasonable hiring process. The reasons for conducting such checks are obvious," and that "even the EEOC conducts criminal background investigations as a condition of employment for

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[4] The EEOC does have limited authority "to issue, amend, or rescind suitable procedural regulations" as required to administer Title VII. 42 U.S.C. § 2000e-12(a).

[5] *Available at* http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

all employees, and conducts credit background checks on approximately 90 percent of its positions") (citation omitted); *EEOC v. Kaplan Higher Learning Educ. Corp.*, 2013 BL 21834, at *5 (N.D. Ohio Jan. 28, 2013) (rejecting as "unsound" and "unreliable" the EEOC's expert's use of "'race-raters,'" individuals who guessed applicants' race by looking at driver's license photos and the individuals' names, in lieu of actual data).

Similarly, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has been filing enforcement actions based on purported statistically significant disparities in the hiring, not of a particular protected group vis-à-vis another, allegedly favored group, but of applicants who are *not* members of a particular protected group. Not surprisingly, an administrative law judge recently granted summary judgment for the contractor in an OFCCP enforcement action accusing the contractor of discriminating against what the judge described as a "custom-designed" group called "Non-Asians." *OFCCP v. VF Jeanswear, L.P.*, No. 2011-OFC-00006, at 7 (OALJ Aug. 5, 2013) (noting that "The 'non-Asian' category upon which the Plaintiff has proceeded is neither a race nor an ethnic group, either by regulatory definition or as used in common parlance"). Shortly thereafter, another administrative law judge rejected an OFCCP discovery request for the same reason. *OFCCP v. Cargill Meat Solutions*, No. 2012-OFC-00001, at 2 (OALJ Aug. 15, 2013) (noting that the relevant section of the implementing regulations "defines five races or ethnic groups, and 'Non-Asian' is not among them").

No fewer than three federal courts of appeals have rejected the National Labor Relations Board's conclusion in *D.R. Horton*, 357 N.L.R.B. No. 184 (Jan.

3, 2012), that the National Labor Relations Act prohibits class action waivers. *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Richards v. Ernst & Young, LLP*, 2013 BL 222217 (9th Cir. Aug. 21, 2013) (*per curiam*); *Sutherland v. Ernst & Young, LLP*, 2013 BL 211217 (2d Cir. Aug. 9, 2013). These are just a few examples of the ways in which federal agencies with authority to enforce employment-related laws in the private sector arguably have abused the privilege.

The Government's position in this case would allow agencies unfettered, unreviewable discretion to rewrite their statutory underpinnings in any way they wish. Unbridled deferral to agency pronouncements by the judicial branch would, as a practical matter, place employers utterly at the mercy of the executive agencies' every whim, without the important second opinion provided by judicial review. As Chief Justice Roberts observed in his dissenting opinion in *City of Arlington v. FCC*:

> The administrative state "wields vast power and touches almost every aspect of daily life." The Framers could hardly have envisioned today's "vast and varied federal bureaucracy" and the authority administrative agencies now hold over our economic, social, and political activities. "[T]he administrative state with its reams of regulations would leave them rubbing their eyes."

133 S. Ct. at 1878 (Roberts, C.J., dissenting) (citations omitted). The judicial branch cannot have abdicated so much of its role in the delicate check and balance system established by the Framers.

CONCLUSION

For the reasons set forth above, the *amicus curiae* Equal Employment Advisory Council respectfully submits that the decision below should be affirmed.

Respectfully submitted,

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October 2013

AMICUS CURIAE BRIEF

No. 12-3

IN THE

Supreme Court of the United States

JACKIE HOSANG LAWSON AND JONATHAN M. ZANG,

Petitioners,

v.

FMR LLC, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the First Circuit

BRIEF OF FORMER SEC OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE EXPANDED ANTI-RETALIATION PROTECTIONS IN DODD-FRANK RENDER UNNECESSARY THE BROAD READING OF SARBANES-OXLEY SECTION 806 URGED BY PETITIONERS 5

II. CONGRESS CHOSE TO HAVE DODD-FRANK WHISTLEBLOWERS REPORT POTENTIAL VIOLATIONS OF THE SECURITIES LAWS TO THE SEC, THE AGENCY WITH THE EXPERTISE TO INVESTIGATE SUCH ALLEGED VIOLATIONS 10

III. DODD-FRANK AND ITS IMPLEMENTING RULES PERMIT WHISTLEBLOWERS TO REPORT POTENTIAL VIOLATIONS INTERNALLY BEFORE OR SIMULTANEOUS WITH ANY REPORTING TO THE SEC 13

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Am. Power & Light Co. v. SEC,
329 U.S. 90 (1946) 11

Asadi v. G.E. Energy (USA), L.L.C.,
720 F.3d 620 (5th Cir. 2013) 15

Credit Suisse Sec. (USA) LLC v. Billing,
551 U.S. 264 (2007) 11

Gordon v. N.Y. Stock Exch., Inc.,
422 U.S. 659 (1975) 11

STATUTES & RULES

7 U.S.C. § 26 13

12 U.S.C. § 5567 13

15 U.S.C. § 78c 10-11

15 U.S.C. § 78u-6 ..... *passim*

18 U.S.C. § 1514A 8, 12

49 U.S.C. § 42121 8

Sarbanes-Oxley Act of 2002,
Pub. L. No. 107-204, § 806,
116 Stat. 745, 802-04 (2002) 1, 8

Dodd-Frank Wall Street Reform
and Consumer Protection Act,
Pub. L. No. 111-203, § 922,
124 Stat. 1376, 1841-49 (2010) 1, 12

Dodd-Frank Wall Street Reform
and Consumer Protection Act,
Pub. L. No. 111-203, § 929A,
124 Stat. 1376, 1852 (2010) 12

17 C.F.R. § 240.21F-2 ..... 7, 9, 15

17 C.F.R. § 240.21F-4 ..... 14, 15

17 C.F.R. § 240.21F-6 15

75 Fed. Reg. 70,488 (Nov. 17, 2010) 9

76 Fed. Reg. 34,300 (June 13, 2011) 14, 15

LEGISLATIVE MATERIALS

S. Rep. No. 111-176 (2010) 10

OTHER AUTHORITIES

SEC Announces Whistleblower Action, SEC.gov (June 12, 2013) 12-13

SEC, *Annual Report on the Dodd-Frank Whistleblower Program Fiscal Year 2012* (Nov. 2012) 12

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The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation, SEC.gov (last visited Oct. 7, 2013) 11

Thomson Reuters Westlaw, Interview with Robert Khuzami (Apr. 25, 2012), westlawbusiness.com 12

INTEREST OF THE *AMICI CURIAE*[1]

Amici Curiae include a former Chairman of, Commissioners of, and a General Counsel to, the Securities and Exchange Commission ("SEC") (the "*Amici*"). *Amici* submit this brief to respond to Petitioners' brief and the *amici* briefs submitted in support thereof. In particular, *Amici* address the impact that Congress's adoption of an expanded statutory anti-retaliation scheme in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841-49 (2010) ("Dodd-Frank")) should have on the Court's interpretation of Section 806 of the Sarbanes-Oxley Act of 2002 (Pub. L. No. 107-204, § 806, 116 Stat. 745, 802-04 (2002) ("Sarbanes-Oxley")).

The *Amici*, listed alphabetically, are:[2]

Paul Atkins, a former Commissioner of the SEC, presently the Chief Executive Officer of Patomak Global Partners, LLC.

Brian G. Cartwright, a former General Counsel of the SEC, presently Scholar in Residence at the Marshall School of Business at the University of

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici* or their counsel made a monetary contribution intended to fund its preparation or submission. Petitioners and Respondents have consented to the filing of *amicus* briefs in support of either party or of neither party and their consents have been filed with the Court.

[2] *Amici* participate solely as individuals and not on behalf of the institutions or entities with which they are affiliated.

Southern California and a Senior Advisor at Patomak Global Partners, LLC.[3]

Charles C. Cox, a former Commissioner of the SEC, presently Executive Vice President at Compass Lexecon.

Christopher Cox, a former Chairman of the SEC, presently President of Bingham Consulting LLC and a Partner at Bingham McCutchen LLP.

Joseph A. Grundfest, a former Commissioner of the SEC, presently William A. Franke Professor of Law and Business, Stanford Law School, and Senior Faculty of the Arthur and Toni Rembe Rock Center on Corporate Governance.

This brief reflects the consensus view of *Amici*, each of whom believes that the decision below should be affirmed, and in so doing, the Court should refuse Petitioners' urged expansion of Section 806 of Sarbanes-Oxley because the Dodd-Frank anti-retaliation regime sufficiently ensures that all employees are protected from retaliation for reporting potential violations of the securities laws.[4]

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[3] Patomak Global Partners, LLC ("Patomak") has been retained by Respondent FMR, LLC since April 1, 2013 to serve as a general advisor regarding regulatory issues. None of Mr. Atkins, Mr. Cartwright, nor Patomak has received any compensation in connection with the preparation of this brief.

[4] All *Amici* share this consensus view and believe that the Court should affirm the judgment of the court of appeals, though each individual *amicus* may not endorse every argument presented in this brief.

SUMMARY OF ARGUMENT

Petitioners argue that extending Section 806 of Sarbanes-Oxley to cover employees of private companies is the only way to protect those employees from retaliation for reporting violations of the securities laws. This argument ignores the recently enacted whistleblower incentives and accompanying anti-retaliation protections in Section 922 of Dodd-Frank, which cover employees of private companies and offer them greater anti-retaliation protections than those provided by Sarbanes-Oxley. The enhanced protections in Section 922 include potential damages in the form of double back pay, direct access to federal courts following an alleged retaliatory act, and a longer statute of limitations. Congress has thus already significantly expanded the federal anti-retaliation protections for employees reporting securities law violations, rendering unnecessary the extra-textual reading of Section 806 urged by Petitioners.

Congress purposely designed Dodd-Frank Section 922's whistleblower reward program and its anti-retaliation protections so that reports of potential securities law violations would be channeled to the SEC, the regulatory agency best positioned to investigate potential violations of the securities laws. As this Court has recognized, the SEC possesses the necessary experience, knowledge, and expertise to distinguish between actions that violate the securities laws and those that do not. For similar reasons, Congress created parallel whistleblower programs covering the commodities market and the consumer finance market, which are

administered by the Commodity Futures Trading Commission ("CFTC") and the Consumer Financial Protection Bureau, respectively.

Although Congress plainly intended that violations be reported to the federal agency with primary expertise, Section 922 of Dodd-Frank does not deter employees who opt to report violations internally at their companies. To the contrary, Dodd-Frank allows potential whistleblowers to utilize an employer's internal audit and reporting structures, if any, prior to providing information about securities law violations to the SEC. Acting pursuant to the authority delegated to it by Congress, the SEC has adopted rules permitting employees to first report alleged violations internally without waiving their eligibility for Dodd-Frank's whistleblower reward program. In fact, the SEC has recognized that a whistleblower's attempt to report violations internally, prior to reporting to the SEC, may support the enhancement of a subsequent whistleblower award.

Section 922 and the SEC's implementing regulations therefore alleviate the concern raised by the Petitioners that the First Circuit's decision in this case creates a gap in whistleblower protections. This Court should not adopt a strained reading of Section 806 of Sarbanes-Oxley when Congress has already acted to extend whistleblower protections to private company employees. The First Circuit's decision below should be affirmed.

ARGUMENT

I. THE EXPANDED ANTI-RETALIATION PROTECTIONS IN DODD-FRANK RENDER UNNECESSARY THE BROAD READING OF SARBANES-OXLEY SECTION 806 URGED BY PETITIONERS

Petitioners and their *amici* advocate a reading of Sarbanes-Oxley Section 806 inconsistent with its plain language by arguing that private company employees will otherwise be unprotected from retaliation for reporting alleged violations of the securities laws.[5] Petitioners' policy argument is moot because with passage of Dodd-Frank, Congress has expanded federal anti-retaliation coverage to private company employees. Dodd-Frank's anti-retaliation provisions supplement those contained in Section 806 of Sarbanes-Oxley, and there is no policy

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[5] Specifically, Petitioners argue that under the First Circuit's interpretation of Section 806 of Sarbanes-Oxley, "no one" in the mutual fund industry "would actually be protected from retaliation." Pet'rs' Br. at 40. Petitioners' *amicus* National Whistleblower Center likewise warns of a "massive loophole" if Sarbanes-Oxley's protection of whistleblowers does not extend to contractors and subcontractors. Nat'l Whistleblower Ctr. Am. Br. at 3. Yet another *amicus* brief maintains that the First Circuit's ruling left "a significant number of employees unprotected" and that a broader interpretation of the statute is "necessary to prevent a crisis in the mutual fund industry . . . " Nat'l Emp't Lawyers Ass'n & Gov't Accountability Project Am. Br. at 3. In a similar vein, the United States contends that the First Circuit's ruling left "significant and unwarranted gaps in whistleblower protection for many of the employees in the best position to discover and report corporate fraud." U.S. Am. Br. at 8.

reason for the Court to ignore settled rules of statutory construction.

With Dodd-Frank, Congress sought to incentivize employees to "blow the whistle" on potential securities law violations. Dodd-Frank thus amended the Securities Exchange Act of 1934 and established a reward program, administered by the SEC, to provide financial compensation for any original information voluntarily provided to the SEC that results in monetary sanctions of more than $1 million. *See* 15 U.S.C. § 78u-6(a)(1) (defining covered administrative or judicial proceedings). Whistleblowers bringing new information to the SEC are eligible to receive between 10 and 30 percent of any monetary sanctions greater than $1 million. *See* 15 U.S.C. § 78u-6(b)(1)(A)-(B). The incentive program is open to "any individual who provides . . . information relating to a violation of the securities laws to the Commission" without regard to whether an individual is employed by a public or private company. 15 U.S.C. § 78u-6(a)(6).

To protect employees reporting potential violations of the securities laws, Section 922 also provides robust federal anti-retaliation protections, without regard to whether an employee works for a public or private company:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistle-blower in the terms and conditions of employment because of any lawful act done by the whistleblower—
>
> (i) in providing information to the Commission in accordance with this section;

> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

15 U.S.C. § 78u-6(h)(1)(A) (emphasis added).

Dodd-Frank thus provides anti-retaliation protections to all employees—*i.e.*, those of private companies as well as those of public companies—who report potential violations of the securities laws to the SEC. Section 922 therefore extends anti-retaliation protections to private contractors and subcontractors, investment advisers, broker-dealers, and all other market participants.

Dodd-Frank's anti-retaliation protections apply to employees reporting the broad range of potential securities law violations falling within the expansive jurisdiction of the SEC. *See* 15 U.S.C. § 78u-6(a)(6) (defining "whistleblower" to include "any individual who provides . . . information relating to a violation of the securities laws to the Commission . . . ."); 17 C.F.R. § 240.21F-2(b)(1)(i) (extending anti-retaliation protections to individuals reporting "a possible securities law violation . . . that has occurred, is ongoing, or is about to occur."). Therefore, complaints like those made by Petitioners regarding Respondents fall within the SEC's comprehensive jurisdiction to enforce the federal securities laws,

including claims under the Securities Act of 1933 and the Investment Company Act of 1940, and would qualify for Dodd-Frank anti-retaliation protections if brought today.

Section 922 of Dodd-Frank provides anti-retaliation protections broader than those contained in Sarbanes-Oxley. Among the key differences:

- Dodd-Frank provides employees with an extended statute of limitations, ranging from three to ten years. *See* 15 U.S.C. § 78u-6(h)(1)(B)(iii). Before Dodd-Frank, claims for retaliation under Sarbanes-Oxley had to be brought within 90 days.[6]
- Dodd-Frank provides employees with anti-retaliation claims a direct route to federal court, rather than to administrative proceeding before the Department of Labor as required by Sarbanes-Oxley. *Compare* 15 U.S.C. § 78u-6(h)(1)(B)(i) *with* Sarbanes-Oxley § 806(a), 18 U.S.C. § 1514A(b) *and* 49 U.S.C. § 42121(b).
- Dodd-Frank also provides greater potential remedies for anti-retaliation claimants, including double back pay. *Compare* 15 U.S.C. § 78u-6(h)(1)(C) *with* Sarbanes-Oxley § 806(a), 18 U.S.C. § 1514A(c)(2)(B) (providing for "the amount of back pay, with interest").

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[6] Section 922(c) of Dodd-Frank also amended the statute of limitations for Sarbanes-Oxley anti-retaliation claims from 90 days to 180 days. *See* 18 U.S.C. § 1514A(b)(2)(D).

The SEC has interpreted Dodd-Frank's anti-retaliation provisions to apply to employees reporting potential violations of the securities laws, regardless of whether a whistleblower's tips lead to a successful enforcement action and an award under the incentive program. *See* 17 C.F.R. § 240.21F-2(b)(1)(i) (defining whistleblower to include employees "with a reasonable belief that the information [they] are providing relates to a possible securities law violation . . . .") (emphasis added); *see also* Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of Securities Exchange Act of 1934, 75 Fed. Reg. 70,488, 70,489 (Nov. 17, 2010) ("[T]he statute extends the protections against employment retaliation in Section 21F(h)(1) to any individual who provides information to the Commission about potential violations of the securities laws regardless of whether the whistleblower fails to satisfy all of the requirements for award consideration set forth in the Commission's rules."). To further encourage employees to report potential misconduct, Dodd-Frank also protects whistleblower anonymity. *See* 15 U.S.C. § 78u-6(h)(2) (prohibiting the SEC from publicly disclosing any information that could reveal the identity of any whistleblower until such disclosure is required in connection with an administrative or judicial proceeding).

The expansive anti-retaliation regime Congress enacted in Dodd-Frank thus renders unnecessary the expansive (and unsustainable) judicial reading of Sarbanes-Oxley Section 806 urged by Petitioners and their *amici* to protect employees of private companies. With passage of Dodd-Frank, Congress expanded federal anti-retaliation protections relating to reporting of securities fraud to bring within the

fold the types of claims brought by persons similarly-situated to Petitioners. They are covered by Section 922 of Dodd-Frank, which provides them with greater anti-retaliation protections than Sarbanes-Oxley provided when Petitioners initiated their claims in 2005 and 2006. Congress thus has purposely and meaningfully responded to any concerns about the protection of employees of privately-held contractors or subcontractors (including those who work in the mutual fund industry) from retaliation for reporting potential securities violations.

II. CONGRESS CHOSE TO HAVE DODD-FRANK WHISTLEBLOWERS REPORT POTENTIAL VIOLATIONS OF THE SECURITIES LAWS TO THE SEC, THE AGENCY WITH THE EXPERTISE TO INVESTIGATE SUCH ALLEGED VIOLATIONS

Senator Dodd's Senate Report on Dodd-Frank stated that its whistleblower provisions were "designed to motivate people who know of securities law violations to tell the SEC." S. Rep. No. 111-176, at 38 (2010) (emphasis added). The text and structure of the Act confirm this intent, by requiring whistleblowers to report potential securities laws violations to the SEC before they may be eligible to receive an incentive award. *See* 15 U.S.C. § 78u-6(b)(1).

Since its creation by the Securities Exchange Act of 1934, the SEC has been the primary agency tasked with regulating the securities industry in the United States, and with enforcing the securities laws. Congress has charged the SEC with protecting

investors and with promoting "efficiency, competition, and capital formation." Securities Exchange Act of 1934, 15 U.S.C. § 78c(f).

The SEC's jurisdiction includes anyone who has potentially violated the securities laws, including public issuers, securities exchanges, broker-dealers, investment advisers, and, particularly relevant here, mutual funds. *See* The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation.[7] The SEC brings hundreds of enforcement actions each year to enforce the securities laws. *Id.*

The Court has long recognized the unique role of the SEC in policing the nation's securities markets. *See, e.g., Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 277 (2007) (noting "SEC power to define and prevent through rules and regulations acts and practices that are fraudulent, deceptive, or manipulative") (citing 15 U.S.C. § 78o(c)(2)(D)); *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 689-90 (1975) (noting "the expertise of the SEC" and "the confidence the Congress has placed in the agency" to administer the Securities Exchange Act); *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 112 (1946) (Because of the SEC's "accumulated experience and knowledge[,] . . . [i]ts judgment is entitled to the greatest weight."). Given its experience and expertise, it is entirely appropriate that Congress determined that the SEC should handle complaints from all types of employees relating to potential violations of the securities laws.

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[7] http://www.sec.gov/about/whatwedo.shtml (last visited Oct. 7, 2013).

In Dodd-Frank, Congress also slightly expanded the scope of Section 806 of Sarbanes-Oxley, to cover employees of non-public subsidiaries of public companies, as well as employees of rating agencies. Dodd-Frank §§ 922(b) and 929A; 18 U.S.C. § 1514A(a). Congress did not, however, expand Section 806 to include employees of all private companies, as it easily could have done. Rather, Congress set a new course with Dodd-Frank: potential violations of the securities laws were to be reported to the SEC, which has both the power and expertise to investigate such allegations. This intent appears to have been fulfilled; the SEC received 3001 whistleblower tips, complaints, and referrals in 2012, the first full year of the program. *See* SEC, *Annual Report on the Dodd-Frank Whistleblower Program Fiscal Year 2012*, at 4 (Nov. 2012).

As to the operation of the SEC's whistleblower program so far, SEC officials have publicly noted an increase in the quality of tips following enactment of Dodd-Frank's whistleblowing program. *See* Thomson Reuters Westlaw, Interview with Robert Khuzami (Apr. 25, 2012) (then-Enforcement Division Director Robert Khuzami noted that the amount and "quality of [whistleblower] tips has increased with more detail and greater supporting documentation").[8] The SEC has announced at least three successful enforcement actions prompted by whistleblowers who each received substantial incentive awards.[9]

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[8] http://currents.westlawbusiness.com/MarketMover.aspx?id=c361a936-685e-4efd-b2d1-76d714302539&cid=&src=&sp=

[9] *See* SEC Issues First Whistleblower Program Award, SEC.gov (Aug. 21, 2012), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171483972; SEC Announces Whistleblower Action, SEC.gov (June 12, 2013), http://www.sec.

Finally, Congress's emphasis on directing employee reporting of alleged misconduct to regulators best suited to address the complaints is further confirmed by the similar whistleblower and anti-retaliation provisions in Dodd-Frank relating to the commodities market and the consumer financial products and services market. In Section 748 of Dodd-Frank, Congress amended the Commodity Exchange Act to create an incentive program administered by the CFTC similar to the SEC program enacted by Section 922. *See* 7 U.S.C. § 26. Dodd-Frank Section 1057 separately provides anti-retaliation protections for employees in the financial services industry who disclose fraudulent or unlawful conduct in connection with the provision of consumer financial products or services. *See* 12 U.S.C. § 5567. These parallel provisions confirm Congress's purposeful intent in Dodd-Frank to delegate investigative responsibility to the agencies with relevant expertise, a marked departure from the former approach under Sarbanes-Oxley.

III. DODD-FRANK AND ITS IMPLEMENTING RULES PERMIT WHISTLEBLOWERS TO REPORT POTENTIAL VIOLATIONS INTERNALLY BEFORE OR SIMULTANEOUS WITH ANY REPORTING TO THE SEC

In Dodd-Frank, Congress made clear its desire that whistleblowers bring serious allegations of

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gov/news/press/2013/2013-06-announcement.htm; SEC Awards More Than $14 Million to Whistleblower, SEC.gov (Oct. 1, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539854258.

wrongdoing relating to securities, commodities and consumer financial products to the attention of appropriate regulators for investigation. But Dodd-Frank does not exclude employees who decide first to report suspected violations to their employers.

In implementing Dodd-Frank's whistleblower protections and in response to criticism that proposed rules would undermine internal compliance and reporting systems, the SEC in its final rule took some steps to tailor the whistleblowing framework to avoid completely undermining employer procedures for internal reporting of potential securities law violations. The Dodd-Frank implementing regulations provide that a whistleblower may become eligible for the incentive program by either reporting immediately and exclusively to the SEC, or by reporting "through an entity's internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law before or at the same time [the employee] reported them to the Commission" if "the entity later provided [the employee's] information to the Commission, or provided results of an audit or investigation initiated in whole or in part in response to information [the employee] reported to the entity . . . ." 17 C.F.R. § 240.21F-4(c)(3); *see also* Securities Whistleblower Incentives & Protections, 76 Fed. Reg. 34,300, 34,325 (June 13, 2011) ("[W]hen the employer[-]provided information 'led to' a successful enforcement action, the whistleblower will be eligible for an award, even if the information the whistleblower originally provided to the employer would not have satisfied the 'led to' requirements."). Employees may also "submit the same information to the Commission . . . within 120 days of providing it to the entity" and remain eligible for the incentive program. 76 Fed.

Reg. 34,300, 34,365; *see also* 17 C.F.R. § 240.21F-4(c)(3).[10] The SEC also identified participation in internal compliance reporting systems as a "[f]actor that may increase the amount of a whistleblower's award." 17 C.F.R. § 240.21F-6(a)(4). Dodd-Frank, therefore, permits whistleblowers to report potential violations of the securities laws internally before or simultaneous with any reporting to the SEC, and employees are in fact incentivized to do so.

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[10] The SEC has interpreted Dodd-Frank's extension of its anti-retaliation protections to whistleblowers "making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002," 15 U.S.C. § 78u-6(h)(1)(A)(iii), to include employees who only report internally (and not to the SEC) pursuant to Sarbanes-Oxley. *See* 17 C.F.R. § 240.21F-2(b)(1). The Fifth Circuit recently rejected this interpretation. *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620, 623 (5th Cir. 2013) (holding Dodd-Frank provides a "private cause of action only for individuals who provide information relating to a violation of the securities laws to the SEC"). This issue, regarding which there is a split in the district courts and upon which *Asadi* is the only Court of Appeals to pass, is not before the Court in this case. In any event, there is no dispute that all employees who report to the SEC, or who report internally and to the SEC, can invoke Dodd-Frank's anti-retaliation provisions.

CONCLUSION

The Court should refuse Petitioners' urged expansion of Section 806 of Sarbanes-Oxley. The Dodd-Frank anti-retaliation regime ensures all employees—including those of privately-held companies—are protected from retaliation for reporting potential violations of the securities laws. For the foregoing reasons and the reasons in the brief of Respondents, *Amici* respectfully urge this Court to affirm the judgment of the First Circuit.

Respectfully submitted,

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October 7, 2013

AMICUS CURIAE BRIEF

No. 12-3

IN THE

Supreme Court of the United States

JACKIE HOSANG LAWSON
AND JONATHAN M. ZANG,

Petitioners,

v.

FMR LLC, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... *ii*

INTEREST OF THE AMICUS 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

A. The Federal Securities Laws Provide Comprehensive Protection for Mutual Fund Investors. 5

B. Mutual Fund Boards and Independent Directors, with the Assistance of Fund CCOs, Oversee Compliance with the Federal Securities Laws. 7

C. Employees of Investment Advisers to Mutual Funds are Incented to "Blow the Whistle" on Suspected Securities Violations and Protected from Retaliation. 12

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Burks v. Lasker,
441 U.S. 471 (1979) 9, 10

Janus Capital Group v. First Derivative Traders,
564 U.S. ___, 131 S. Ct. 2296 (2011) 8

Jones v. Harris Assocs.,
559 U.S. 335 (2010) 10

STATUTES

15 U.S.C. § 78u-6 ..... 13, 15

15 U.S.C. § 80a-2 9

15 U.S.C. § 80a-15 7

15 U.S.C. § 80a-35 11

15 U.S.C. § 80a-41 16

15 U.S.C. § 80b-9 16

18 U.S.C. § 1514A ..... passim

Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 ..... 2, 12

Pub. L. No. 111-203, § 922, 124 Stat. 1841 (2010) 13

TABLE OF AUTHORITIES
(Continued)

Page

Pub. L. No. 111-203, § 923, 124 Stat. 1850 (2010) 16

OTHER AUTHORITIES

17 C.F.R. § 270.17j-1 7

17 C.F.R. § 270.38a-1 ..... 5, 11, 12

17 C.F.R. § 275.206 6

Compliance Programs of Investment Companies and Investment Advisers, Investment Company Act Release No. 26,299, Investment Advisers Act Release No. 2204, 68 Fed. Reg. 74,714, 74,722 (Dec. 24, 2003) 8, 11, 12

In the Matter of the Claim for Award: Order Determining Whistleblower Award Claim, Exchange Act Release No. 70,554 (Sept. 30, 2013) 14

Investment Company Institute & Independent Directors Council, Overview of Fund Governance Practices, 1994 – 2012 (2013) 10

Role of Independent Directors of Investment Companies, Securities Act Release No. 7932, Exchange Act Release No. 43,786, Investment Company Act Release No. 24,816, 66 Fed. Reg. 3734 (Jan. 16, 2001)..... 9, 11

TABLE OF AUTHORITIES
(Continued)

Page

S. Rep. No. 76-1775 (1940) 9

SEC, *Public Policy Implications of Investment Company Growth*, H.R. Doc. No. 89-2337 (1966) 5, 8, 10

SEC Awards More than $14 Million to Whistleblower, SEC Press Release No. 2013-209 (Oct. 1, 2013) 14

SEC Form TCR 16, 17

Securities Whistleblower Incentives and Protections, Exchange Act Release No. 64,545, 76 Fed. Reg. 34,300 (June 13, 2011) 13, 16

Sup. Ct. R. 37.6 1

William H. Donaldson, Chairman, SEC, Remarks before the Mutual Fund and Investment Management Conference (Mar. 14, 2005) 11

INTEREST OF THE *AMICUS*[1]

The Investment Company Institute ("ICI") is the national association of registered investment companies in the United States. ICI has three core missions: (1) encouraging adherence to high ethical standards by all industry participants; (2) advancing the interests of investment companies and their shareholders, directors, and investment advisers; and (3) promoting public understanding of registered open-end management investment companies ("mutual funds") and other registered investment companies. As part of its mission to promote public understanding of mutual funds, ICI pursues an extensive research program and is the primary source of aggregate industry data relied on by government regulators, industry participants, and independent observers. As of August 2013, ICI's members manage total assets of $15.2 trillion and serve more than 90 million shareholders in the United States.

Petitioners imply that mutual fund investors will be unprotected from fraud unless the Court extends the statutory language of section 806 of the Sarbanes-Oxley Act of 2002 ("SOX"), codified at 18 U.S.C. § 1514A, to cover private company employees. Indeed, one of Petitioners' amici goes so far as to claim that "a catastrophe in the mutual fund indus-

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief; both parties have filed a blanket consent with the Court to the filing of all *amicus* briefs.

try," similar to the Enron scandal, may occur unless the Court stretches section 1514A to cover private company employees. The ICI recognizes and appreciates the importance of protecting corporate whistleblowers, but we disagree with both views and find them simply insupportable.

SUMMARY OF THE ARGUMENT

Petitioners strongly imply, and their amici explicitly claim, that the failure to extend section 1514A to cover private company employees "violates the clear Congressional intent to address the wrongs brought to light from Enron and Arthur Anderson and could lead to a similar disaster in the mutual fund industry."[2] This ignores not only the comprehensive regulation of the mutual fund industry and the important roles of fund boards of directors ("boards"), including their independent directors, and chief compliance officers ("CCOs"), but also Congress' more recent actions to protect whistleblowers through the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 ("Dodd-Frank Act"). The Court should disregard Petitioners' and

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[2] Brief of *Amicus Curiae* National Employment Lawyers Association and Government Accountability Project in Support of Petitioners at 20, *Lawson v. FMR LLC*, No. 12-3 (Aug. 7, 2013); *see also* Brief for Petitioners at 53-61, *Lawson v. FMR LLC*, No. 12-3 (July 31, 2013) (detailing the events and commentary associated with the Enron and Arthur Anderson scandals and speculating about both (i) the connection between those events and section 1514A, and (ii) the results of the First Circuit's interpretation of section 1514A had it been in effect prior to the collapse of Enron).

their amici's unfounded rhetoric and focus on the statutory construction of section 1514A in resolving this case.

Mutual funds operate under a regulatory regime arguably more comprehensive than that governing any other financial product. This regulatory regime includes the Investment Company Act of 1940, as amended ("1940 Act"), and the Investment Advisers Act of 1940, as amended ("Advisers Act"), as well as other federal securities laws and the related regulations of the U.S. Securities and Exchange Commission ("SEC" or "Commission"). Given the breadth, comprehensiveness, and long-standing coherence of this regulatory structure, the argument that, to protect investors and prevent financial crises, it is necessary to extend section 1514A beyond the public company context for which it was enacted is simply hyperbole that must be rejected.

It is true that mutual funds characteristically are externally managed. Each fund, however, has a board that includes independent directors to oversee fund compliance with the federal securities laws. Independent directors, who, with rare exception, comprise a majority of mutual fund boards, are recognized as funds' independent "watchdogs" and serve to balance potential conflicts of interest between funds and their investment advisers. Fund CCOs assist the board and the independent directors in performing these functions. Congress and the courts are well aware of this structure and repeatedly have recognized the important role that boards and independent directors play in overseeing fund compliance with the

federal securities laws and the protection of mutual fund shareholders.

The ICI recognizes and appreciates the importance of protecting corporate employees against retaliation by their employers. The Court should recognize, however, that employees of investment advisers are affirmatively incented to "blow the whistle" on suspected securities violations and are protected from retaliation by provisions in the recently-enacted Dodd-Frank Act that apply expressly in the mutual fund and investment adviser context. Given these explicit protections that Congress has mandated, there is no reason to do violence to the plain language of section 1514A by extending its protections beyond those public company employees it was intended to protect. This is particularly true in the context of mutual funds and investment advisers, which are subject to a strong and comprehensive regulatory regime that was deliberately designed to protect investors. If Congress had intended that result, it would have done so expressly.

For these reasons, the judgment of the Court of Appeals for the First Circuit should be affirmed.

ARGUMENT

Drawing on the ICI's unique perspective and particular expertise, the purpose of this brief is to (1) illustrate the robust and comprehensive protections mutual fund shareholders enjoy; (2) explain the role that fund boards, independent directors and CCOs play in overseeing funds' compliance with applicable law; and (3) identify the whistleblower protections under recently-enacted legislation afforded

to those who report violations of the federal securities laws to the SEC, including the employees of private contractors, such as investment advisers to mutual funds. Together, these provisions demonstrate that the protection of mutual fund investors from fraud does not depend, as Petitioners and their amici contend, on the extension of section 1514A to private company employees.

A. The Federal Securities Laws Provide Comprehensive Protection for Mutual Fund Investors.

Mutual funds operate under a regulatory regime arguably more comprehensive than that governing any other financial product. Mutual fund investors are protected from potential abuses, conflicts of interest, fraud and other wrongdoing by numerous provisions of the extensive, interconnected regulatory regime imposed by the 1940 Act, the Advisers Act, and other federal securities laws, as well as by the detailed rules enacted by the SEC.[3] For example:

- 1940 Act rule 38a-1,[4] discussed in greater detail below, requires mutual funds to designate CCOs and adopt and implement compliance policies and procedures designed to ensure

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[3] *See, e.g.*, SEC, *Public Policy Implications of Investment Company Growth*, H.R. Doc. No. 89-2337, at 59-63 (1966) ("1966 Report") (explaining how each of the federal securities laws interacts with the mutual fund industry and how they, together with the 1940 Act, "establish significant regulatory controls over the investment company industry").

[4] 17 C.F.R. § 270.38a-1.

compliance with the federal securities laws (including policies and procedures that provide for the oversight of compliance by each investment adviser and certain other service providers to a mutual fund). The rule also requires that the CCO review the adequacy of the policies and procedures of the fund and of each applicable service provider and the effectiveness of their implementation at least annually and submit a written report to the board with the findings;

- Advisers Act rule 206(4)-7[5] requires investment advisers registered with the Commission to adopt and implement policies and procedures designed to prevent violations of the Advisers Act and the rules thereunder, review annually the adequacy of such policies and procedures and the effectiveness of their implementation, and designate a CCO responsible for administering such policies and procedures;

- Advisers Act rule 206(4)-8[6] prohibits fraudulent activities by investment advisers – untrue statements of material fact; omissions to state a material fact necessary to make the statements not misleading; otherwise engaging in any act, practice, or course of business that is fraudulent, deceptive or manipulative – with respect to investors or prospective investors in

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[5] 17 C.F.R. § 275.206(4)-7.

[6] *Id.* at § 275.206(4)-8.

pooled investment vehicles (including mutual funds) that the adviser advises;

- Section 15(a) of the 1940 Act[7] requires that a mutual fund's board of directors review and approve annually the investment adviser's management contract with the fund; and

- 1940 Act rule 17j-1[8] requires, among other things, that each mutual fund (with limited exceptions), and each investment adviser of and principal underwriter for the fund, adopt a written code of ethics designed to prevent certain enumerated fraudulent activities in connection with the purchase or sale of securities for the fund's portfolio.

These examples only begin to highlight the numerous and comprehensive protections mutual funds and their shareholders enjoy under the federal securities laws.

B. Mutual Fund Boards and Independent Directors, with the Assistance of Fund CCOs, Oversee Compliance with the Federal Securities Laws.

Petitioners contend that, because the fund has no employees of its own, only the employees of a mutual fund's investment adviser could be aware of vio-

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[7] 1940 Act § 15(a) (15 U.S.C. § 80a-15(a) (2012)).

[8] 17 C.F.R. § 270.17j-1.

lations.[9] This argument ignores the important role that boards, independent directors, and CCOs play in protecting the interests of funds and their shareholders.

The external management model, where the fund is managed by an investment adviser engaged for professional portfolio management and related services, predominates in the mutual fund industry.[10] The practice of external management of mutual funds "is one of long standing and was firmly imbedded in the industry at the time that the [1940 Act] was under consideration."[11] Indeed, the Court has recently acknowledged the structural distinctness of mutual funds and their advisers.[12]

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[9] Brief for Petitioners at 39-40, *Lawson v. FMR LLC*, No. 12-3 (July 31, 2013).

[10] *See, e.g.*, Compliance Programs of Investment Companies and Investment Advisers, Investment Company Act Release No. 26,299, Investment Advisers Act Release No. 2204, 68 Fed. Reg. 74,714, 74,722 (Dec. 24, 2003) ("Compliance Programs of Investment Companies and Investment Advisers ") ("[f]unds today typically have no employees, and delegate management and administrative functions . to one or more service providers"). We are aware of only one internally-managed mutual fund in the United States. There are a relatively small number of closed-end funds that are internally managed and that do have employees of their own.

[11] 1966 Report at 49.

[12] *See Janus Capital Group v. First Derivative Traders*, 564 U.S. ___, 131 S. Ct. 2296, 2299, 2304 (2011) (noting that although the investment adviser in that case created the relevant mutual fund, the fund "is a separate legal entity owned entirely by mutual fund investors" and that the Court "decline[d] . to disregard [such] corporate form").

The external management model presents the potential for certain conflicts of interest, as the Court also has recognized.[13] In considering and enacting the 1940 Act, mindful of this potential,[14] Congress required that at least 40% of a mutual fund's board of directors be independent,[15] and assigned to those independent directors "a host of special responsibilities involving supervision of management and financial auditing."[16]

Regulatory action by the SEC further enhanced the independence and effectiveness of mutual fund boards as checks on potential conflicts of interest inherent in the external management structure.[17] As a result of these regulatory changes, virtually all mutual funds now have, among other things, boards that are composed of at least a majority of independent directors and independent directors that must be

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[13] *See, e.g., Burks v. Lasker*, 441 U.S. 471, 481 (1979).

[14] *Id.* at 480-81; *see generally* S. Rep. No. 76-1775 (1940).

[15] A mutual fund director is independent if he or she is not an "interested person" of the fund, as that term is defined in the 1940 Act. *See* 15 U.S.C. § 80a-2(a)(19); *see also Burks*, 441 U.S. at 482 (explaining that, in 1970, "Congress amended the [1940] Act to strengthen further the independence of these directors adding the stricter requirement that the outside directors not be 'interested persons'").

[16] *Burks*, 441 U.S. at 482-83.

[17] Role of Independent Directors of Investment Companies, Securities Act Release No. 7932, Exchange Act Release No. 43,786, Investment Company Act Release No. 24,816, 66 Fed. Reg. 3734 (Jan. 16, 2001) ("Role of Independent Directors of Investment Companies").

selected and nominated by other independent directors.[18]

The Court has recognized that a fund's independent directors serve as "independent watchdogs" who "'furnish an independent check upon the management' of investment companies."[19] Independent directors are responsible for, among other things, reviewing and approving the continuation of a mutual fund's advisory and underwriting contracts and selecting the fund's auditors who review the fund's financial statements and disclosures.[20] Moreover, a

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[18] This regulatory change was accomplished by conditioning reliance upon any of 10 rules, each of which exempts the fund from certain stringent requirements and upon which nearly all funds rely, on the fund's board meeting the enhanced independence requirements. *See id.* According to our most recent survey, as of year-end 2012, independent directors made up three-quarters of boards in 85 percent of fund complexes, nearly two-thirds of fund complexes have an independent board chair and more than nine in ten have separate legal counsel to serve their independent directors. *See* INVESTMENT COMPANY INSTITUTE & INDEPENDENT DIRECTORS COUNCIL, *Overview of Fund Governance Practices, 1994 - 2012* (2013).

[19] *Burks*, 441 U.S. at 484 (quoting *Tannenbaum v. Zeller*, 552 F.2d 402, 406 (2d Cir. 1976) and Hearings on H.R. 10065 before a Subcommittee of the H. Comm. on Interstate and Foreign Commerce, 76th Cong., 3d Sess., 109 (1940)); *see also Jones v. Harris Assocs.*, 559 U.S. 335, 348 (2010) ("The [1940] Act interposes disinterested directors as 'independent watchdogs' of the relationship between a mutual fund and its adviser"); *cf.* 1966 Report at 67 ("The [1940] Act sought to check the theretofore virtually unrestricted power of management groups by imposing specific requirements with respect to the composition of the boards of directors of investment companies").

[20] *Burks*, 441 U.S. at 483.

mutual fund's board, including its independent directors, has "broad responsibilities to monitor compliance with securities, corporate and other laws,"[21] and fund directors, including independent directors, owe fiduciary duties to the fund.[22]

In order to assist the board and the independent directors, mutual fund CCOs serve as the "eyes and ears of the board on matters of compliance."[23] Indeed,

> rule 38a-1 [of the 1940 Act] provides fund boards with direct access to a single person with overall compliance responsibility for the fund who answers directly to the board. The rule provides the board with a powerful tool to exercise its oversight responsibilities over fund compliance matters. . . . [The CCO is] responsible for keeping the board apprised of significant compliance events at the fund or its service providers . . .[24]

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[21] Role of Independent Directors of Investment Companies, at 3735 n.6.

[22] 1940 Act § 36(a) (15 U.S.C. § 80a-35(a) (2012)).

[23] William H. Donaldson, Chairman, SEC, Remarks before the Mutual Fund and Investment Management Conference (Mar. 14, 2005).

[24] Compliance Programs of Investment Companies and Investment Advisers, at 74,722; *see also* 17 C.F.R. § 270.38a-1.

Rule 38a-1 requires a fund's CCO to report directly to the fund's board. The designation and compensation of a fund's CCO must be approved by the fund board, and only the board, including a majority of the independent directors, has the authority to remove the CCO.[25]

Against this backdrop, it is clear that each mutual fund, even without employees of its own, has a set of responsible individuals who play a role in promoting and overseeing the fund's compliance with all applicable laws. To claim, as the Petitioners do,[26] that only the employees of a mutual fund's investment adviser would be aware of violations because the fund has no employees of its own is to ignore these structural safeguards, which have served effectively to protect the interests of funds and their shareholders.

C. Employees of Investment Advisers to Mutual Funds are Incented to "Blow the Whistle" on Suspected Securities Violations and Protected from Retaliation.

Protecting whistleblowers from retaliation plays an important role in the existing regulatory scheme. Contrary to Petitioners' assertions, declining to do violence to the plain language of section 1514A by extending its protections beyond their in-

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[25] 17 C.F.R. § 270.38a-1(a)(4); *see also* Compliance Programs of Investment Companies and Investment Advisers.

[26] Brief for Petitioners at 39-40, *Lawson v. FMR LLC*, No. 12-3 (July 31, 2013).

tended reach to cover the employees of private contractors of mutual funds does not, in the instant case or any other, mean that "no one would actually be protected from retaliation."[27] This claim wholly ignores recently enacted federal legislation that was explicitly incorporated into the 1940 Act and the Advisers Act.

As part of the Dodd-Frank Act, enacted in response to the recent financial crisis, Congress amended the Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (15 U.S.C. §§ 78a *et seq.*) ("Exchange Act") to include new section 21F, "Securities Whistleblower Incentives and Protection."[28] In doing so, Congress directly addressed any perceived gap in whistleblower protection in the mutual fund context. Pursuant to section 21F, whistleblowers who voluntarily provide the SEC with original information concerning securities law violations that leads to successful SEC enforcement proceedings may be eligible for monetary awards.[29] This has provided a signifi-

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[27] *Id.* at 40.

[28] Pub. L. No. 111-203, § 922(a), 124 Stat. 1841 (2010).

[29] *See* Exchange Act § 21F(b)(1) (15 U.S.C. § 78u-6(b)(1)) ("In any covered judicial or administrative action, or related action, the Commission . shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action "); Securities Whistleblower Incentives and Protections, Exchange Act Release No. 64,545, 76 Fed. Reg. 34,300 (June 13, 2011) ("Securities Whistleblower Incentives and Protections") ("The Dodd-Frank [Act] established a whistleblower program that requires the Commission to pay an award, under regula-

cant incentive for whistleblowers to come forward. Indeed, the SEC just announced an award of more than $14 million – the largest made by the SEC's whistleblower program to date – to a whistleblower whose information led to an SEC enforcement action that recovered substantial investor funds.[30]

Moreover, section 21F(h)(1) explicitly prohibits retaliation by employers against whistleblowers. It provides that:

> (A) No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower –
>
> (i) In providing information to the Commission in accordance with this section;

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tions prescribed by the Commission and subject to certain limitations, to eligible whistleblowers . . ").

[30] In the Matter of the Claim for Award: Order Determining Whistleblower Award Claim, Exchange Act Release No. 70,554 (Sept. 30, 2013); *see also SEC Awards More Than $14 Million to Whistleblower*, SEC Press Release No. 2013-209 (Oct. 1, 2013). In commenting on this award, SEC Chair Mary Jo White stated, "Our whistleblower program already has had a big impact on our investigations by providing us with high quality, meaningful tips." SEC Press Release No. 2013-209.

> (ii) In initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) In making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 . . . , the Securities Exchange Act of 1934 . . . , and any other law, rule, or regulation subject to the jurisdiction of the Commission."[31]

This broad prohibition against retaliation is accompanied by a statutory private right of action that can result in a reinstatement of a whistleblower's employment with the same status as the individual would have had absent the discrimination, two times back pay plus interest, and compensation for litigation costs, expert witness fees, and reasonable attorneys' fees.[32]

Congress amended both the 1940 Act and the Advisers Act to incorporate the Dodd-Frank whistleblower protections, demonstrating Congressional intent that those protections be available in the context of mutual funds and their investment advisers. Specifically, Dodd-Frank sections 923(a)(2) and (a)(3) amended the 1940 Act and Advisers Act provisions concerning the payment of penalties imposed under the 1940 Act and Advisers Act, respectively, to recog-

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[31] Exchange Act § 21F(h)(1)(A) (15 U.S.C. § 78u-6(h)(1)(A)).

[32] *Id.* at § 21F(h)(1)(C) (15 U.S.C. § 78u-6(h)(1)(C)).

nize penalties pursuant to the Exchange Act section 21F protections. In each case, the statute was amended to provide that "[a] penalty imposed under this section shall be payable into the Treasury of the United States except as otherwise provided in section 308 of the Sarbanes-Oxley Act of 2002 *and section 21F of the Securities Exchange Act of 1934*."[33] This stands in sharp contrast to section 1514A. Unlike unrelated SOX section 308, section 1514A was not accompanied by any corresponding amendment to the 1940 Act or the Advisers Act; nor did Congress amend section 1514A to extend its protections to private company whistleblowers when it considered whistleblower protections as part of the Dodd-Frank Act. Thus, whereas the Dodd-Frank Act clearly contemplates whistleblowing by employees of investment advisers (and expressly protects them from retaliation), section 1514A does not.

In implementing the Dodd-Frank whistleblower protection provisions, the SEC has included investment advisers (and investment adviser representatives), mutual funds and, more broadly, both privately held and publicly held companies among the entities against which complaints could be made.[34] Specifically, the SEC developed a form – Form TCR – for use by whistleblowers in notifying the Commission of a tip, complaint, or referral re-

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[33] 1940 Act § 42(e)(3)(A) (15 U.S.C. § 80a-41(e)(3)(A) (2012)) (emphasis added); Advisers Act § 209(e)(3)(A) (15 U.S.C. § 80b-9(e)(3)(A) (2012)) (emphasis added); *see* Dodd-Frank Act §§ 923(a)(2) and (a)(3), 124 Stat. 1850 (2010).

[34] *See* Securities Whistleblower Incentives and Protections.

garding potential securities law violations.[35] The form calls for a description of the "individual or entity you have a complaint against"; the form's instructions explain that for these questions, one is to choose among a list of possible individuals and entities to which the complaint relates, which list includes "investment advisor, investment advisor representative, investment company, . . . mutual fund, . . . private/closely held company, [and] publicly held company."[36]

The whistleblower protections adopted by the SEC pursuant to the Dodd-Frank Act play an important role in the mutual fund regulatory scheme. In light of these protections, Petitioners' claim that declining to stretch section 1514A beyond the public company context would result in whistleblowers in the mutual fund industry being entirely unprotected from retaliation is unpersuasive and should be rejected.

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[35] *See* SEC Form TCR.

[36] *Id.* at Instructions: Section C, Question 1.

CONCLUSION

Petitioners strongly imply, and their amici explicitly argue, that the failure to extend section 1514A to cover private company employees will leave mutual fund investors unprotected and may result in a catastrophe in the mutual fund industry akin to the Enron and Arthur Anderson scandals. We disagree with both assertions and find them simply insupportable.

Mutual funds and their investment advisers operate under a comprehensive, coherent, and highly integrated regulatory regime that has benefited and protected investors for over seventy years. Each fund, even without employees of its own, has a set of responsible individuals who play a role in promoting and overseeing the fund's compliance with all applicable laws. Moreover, recently-enacted federal whistleblower protection legislation, which, unlike section 1514A, was explicitly incorporated into the 1940 Act and the Advisers Act, protects employees of mutual fund investment advisers.

Thus, the fact that section 1514A's protections for public company employee whistleblowers do not extend to the employees of private contractors to mutual funds has little bearing or impact on the protections that mutual fund investors enjoy or on the ability to prevent future crises in the mutual fund industry. The Court should disregard Petitioners' and their amici's unfounded rhetoric and focus on the statutory construction of section 1514A in resolving this case.

For all the reasons set forth herein, the judgment of the Court of Appeals for the First Circuit should be affirmed.

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AMICUS CURIAE BRIEF

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On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. CONGRESS DID NOT INTEND TO CREATE A NEW FEDERAL RETALIATION CAUSE OF ACTION FOR THE MILLIONS OF EMPLOYEES OF PRIVATE COMPANIES	4
A. The Common Law Principle of At-Will Employment Should be Respected in the Absence of Clear Congressional Repudiation	6
B. Applying Section 806 to Private Companies Will Have a Deleterious Effect on Small Businesses	8
II. THE COURT OF APPEALS' CONSTRUCTION OF SECTION 806 RESPECTS THE FULL CONTEXT OF THE SARBANES-OXLEY ACT	13
A. Anti-retaliation Provisions Further the Goals of the Statutes they Support	13
B. Expanding Section 806 to Protect Private Company Employees Goes Well Beyond the Purposes of the Sarbanes-Oxley Act	18
CONCLUSION	21

TABLE OF AUTHORITIES

CASES Page(s)

Am. Nuclear Res., Inc. v. U.S. Dep't of Labor, 134 F.3d 1292 (6th Cir. 1998) 16

Birkbeck v. Marvel Lighting Corp., 30 F.3d 507 (4th Cir. 1994) 17

Carnero v. Boston Scientific Corp., 433 F.3d 1 (1st Cir. 2006) 18

Clackamas Gastroenterology Assocs., P. C. v. Wells, 538 U.S. 440 (2003) 17

Engquist v. Or. Dep't of Agric., 553 U.S. 591 (2008) 6, 12

Foremost-McKesson, Inc. v. Provident, 423 U.S. 232 (1976) 7, 8

Hill v. Mr. Money Fin. Co. & First Citizens Banc Corp., 309 F. App'x 950 (6th Cir. 2009) 15

Hill v. Tenn. Valley Auth., 87-ERA-23 and 24, Secretary's Decision of Order and Remand (Dep't of Labor May 24, 1989) ... 6

Janus Capital Grp., Inc. v. First Derivative Traders, 564 U.S. ___, 131 S. Ct. 2296 (2011) 12

Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. ___, 133 S. Ct. 1351 (2013) 5, 7, 8, 10

Lamie v. U.S. Tr., 540 U.S. 526 (2004) 4, 13

Lippert v. Cmty. Bank, Inc., 438 F.3d 1275 (11th Cir. 2006) 14-15

TABLE OF AUTHORITIES—Continued

Page(s)

Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor, 992 F.2d 474 (3d Cir. 1993) 16

Public Citizens v. U.S. Dep't of Justice, 491 U.S. 440 (1989) 5

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 11

Samantar v. Yousef, 560 U.S. 305 (2010) 7

Schroeder v. Greater New Orleans Fed. Credit Union, 664 F.3d 1016 (5th Cir. 2011) 15

Shea v. Emmanuel Coll., 682 N.E.2d 1348 (Mass. 1997) 8

U.S. E.E.O.C. v. AIC Sec. Investigations, Ltd., 55 F.3d 1276 (7th Cir. 1995) 17

United States v. Texas, 507 U.S. 529 (1993) 7

United States v. Ron Pair Enters., 489 U.S. 235 (1989) 5

Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. ___, 133 S. Ct. 2517 (2013) 10

STATUTES

12 U.S.C. § 1831j 14

18 U.S.C. § 1514A 5, 11

Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 ..... 16, 16-17

29 U.S.C. § 630 17

TABLE OF AUTHORITIES—Continued

Page(s)

Americans with Disabilities Act of 1990, 42 U.S.C. § 12111 17

42 U.S.C. § 12203 ..... 16, 17

Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-3 16

42 U.S.C. § 2000e 17

Clean Air Act § 312, 42 U.S.C. § 7622 15

Comprehensive Environmental Response, Compensation, and Liability Act § 110, 42 U.S.C. § 9610 15

Energy Reorganization Act § 211, 42 U.S.C. § 5851 15

Equal Pay Act, 29 U.S.C. § 206 17

Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) 14

Safe Drinking Water Act § 1450, 42 U.S.C. § 300j-9 15

Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002). 18

§ 806 ..... *passim*

Solid Waste Disposal Act § 7001, 42 U.S.C. § 6971 15

Toxic Substance Control Act § 23, 15 U.S.C. § 2622 15

TABLE OF AUTHORITIES—Continued

Page(s)

Water Pollution Control Act § 2, 33 U.S.C. § 1367 15

OTHER AUTHORITIES

148 Cong. Rec. H5462 (daily ed. July 25, 2002) 18

148 Cong. Rec. S7350 (daily ed. July 25, 2002) 5

H.R. Rep. No. 95-1796 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7304 6

Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection Law*, 38 Am. Bus. L.J. 99 (2000) 8

Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771 (1980) 19

Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 Wash. L. Rev. 1029 (2004) 7

Nancy M. Modesitt, *The* Garcetti *Virus*, 80 U. Cin. L. Rev. 137 (2011) 8

Nicole V. Crain & W. Mark Crain, Small Bus. Admin., *The Impact of Regulatory Costs on Small Firms* (2010) 10

S. Rep. No. 107-146 (2002) 5

TABLE OF AUTHORITIES—Continued

Page(s)

Sara A. Corello, Note, *In-House Counsel's Right to Sue for Retaliatory Discharge*, 92 Colum. L. Rev. 389 (1992) 8

Tort Liability Costs for Small Business (2010), http://www.instituteforlegalreform.com/sites/default/files/ilr_small_business_2010_0.pdf 9

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INTEREST OF THE *AMICUS CURIAE* [1]

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and to be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, with offices in Washington, D.C. and all 50 State capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate, and grow their businesses. NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member has fewer than 10 employees and reports gross sales of about $500,000 a year.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases involving issues that affect small businesses. The NFIB Legal Center is filing a brief in this case to apprise the Court of the consequences—for small businesses in particular—of construing the scope of the whistleblower provisions of Section 806 of the

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[1] This amicus brief is filed with the parties' consent. The parties filed their consents with the Clerk of Court in July 2013. No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

Sarbanes-Oxley Act of 2002 to cover employees of private companies.

SUMMARY OF ARGUMENT

The Court of Appeals properly applied the tools of statutory interpretation to construe Section 806 according to its plain language and structure. It rejected an alternative construction, advanced by Petitioners, which is neither warranted by the plain language of the statute nor justified by any expression of Congressional intent. Petitioners seek reversal of the Court of Appeals' construction, but in doing so limit their focus to the mutual fund industry and fail to address the consequences that their reading of Section 806 would have on other private businesses, including some six million small business employers operating in this country.[2] Expanding the reach of Section 806 would have a significant impact on small businesses and do nothing to advance the goals of the Sarbanes-Oxley Act.

The plain language of Section 806 expressly limits its whistleblower protections to employees of certain enumerated public and reporting companies. To stretch that text to reach the employees of private companies would significantly derogate the common law principle of at-will employment. Because Congress has not explicitly expressed any intent to alter that historic employer-employee relationship for private companies, there is no basis for imputing that meaning to the text.

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[2] *See* U.S. Census Bureau, Statistics of U.S. Businesses, Table 1 (2007), *available at* http://www.census.gov/econ/smallbus.html (last visited Sept. 23, 2013).

Moreover, the construction of Section 806 advanced by Petitioners is simply unworkable for the vast majority of American companies. Small businesses in particular are unlikely to have the expertise properly to evaluate complaints regarding financial improprieties by their clients. In addition, small businesses would face prohibitive cost constraints were they required to institute the sophisticated internal financial controls that public companies are required to implement, or to retain the separate staff that larger companies employ to handle employment-related claims from their workforce. In a small business, the same person who investigates the fraud-related complaints is often responsible for supervising the employee, increasing the likelihood of false retaliation allegations.

Finally, consistent with other Federal whistleblower laws, Section 806 should be interpreted to apply only so far as is necessary to promote the goals of the Sarbanes-Oxley Act. Because applying Section 806 to small businesses does nothing to promote those goals, Petitioners' construction should be rejected.

Given the significant burdens Section 806 would impose on small businesses, reading Section 806 expansively is unwarranted. The Court of Appeals' construction recognizes this burden and avoids exposing millions of small businesses—regardless of their size or the nature or extent of their relationship to the public company—to an unexpected and complex form of civil liability.

ARGUMENT

I. CONGRESS DID NOT INTEND TO CREATE A NEW FEDERAL RETALIATION CAUSE OF ACTION FOR THE MILLIONS OF EMPLOYEES OF PRIVATE COMPANIES.

As of 2008, there were more than 27 million small businesses in the United States and nearly 6 million small business employers.[3] NFIB counts 350,000 small businesses as members, approximately 74 percent of which employ 10 or fewer people. These businesses operate in various industries, including retail, wholesale, services, construction, finance, insurance, technology, and real estate. Accordingly, there are a number of different capacities in which these small businesses may find themselves working with publicly-traded companies. Examples include the software developer that helps the public company meet its technology needs; the local advertising company or public relations firm that handles the company's communications needs; the local catering company that services the public company's cafeteria; or the cleaning service that comes in at the end of the day. The Court of Appeals' construction appropriately rejected a result under which every employee of each of these small private businesses would be covered by Section 806 and potentially immunized from any performance-related discipline or non-performance-related downsizing by their employers simply by raising a complaint about broadly-covered misconduct.

It is well settled that courts undertake to give effect to the plain meaning of the text of a statute. *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004). Respondents have

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[3] *See* U.S. Census Bureau, *supra* note 2, at Table 2a.

demonstrated why the plain language of the statute supports the Court of Appeals' construction of Section 806. Resp'ts' Br. at 13-24. On its face, the text confirms that Congress was referring to employees of public and reporting companies when it used the term "an employee"; both the words and the headings in Section 806 support this conclusion.

It is also well settled that, when necessary, courts will consider the practical implications of alternative constructions. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. ___, 133 S. Ct. 1351, 1358, 1364-67 (2013) (determining first-sale doctrine under copyright laws was not subject to geographical restriction, noting "[w]e also doubt that Congress would have intended to create the practical copyright-related harms with which a geographical interpretation would threaten ordinary scholarly, artistic, commercial, and consumer activities"). Here, the Court of Appeals quite properly rejected a construction of Section 806 that would "produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989); *see also Public Citizens v. U.S. Dep't of Justice*, 491 U.S. 440, 452-54 (1989) (finding literal reading of statute would catch far more groups and arrangements than Congress conceivably could have intended).

Congress made its intent clear: Section 806 "would provide whistleblower protection to employees of *publicly traded companies*." S. Rep. No. 107-146, at 13 (2002) (emphasis added); *see also* 148 Cong. Rec. S7350, S7351 (daily ed. July 25, 2002) (statement of Sen. Sarbanes); *id.* at S7358 (statement of Sen. Leahy); 18 U.S.C. § 1514A(a), title ("Whistleblower protection for employees of *publicly traded companies*."

(emphasis added)).[4] There is simply no evidence that when Congress was enacting a statutory scheme entirely directed at preventing fraud at publicly traded companies, it intended to include private companies—and in particular small businesses—in the anti-retaliation provisions of that statutory scheme.

A. The Common Law Principle of At-Will Employment Should be Respected in the Absence of Clear Congressional Repudiation.

Extending the scope of Section 806 to protect the employees of private companies would invade the common law principle of at-will employment. *See, e.g., Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 606 (2008) (acknowledging basic principle of at-will employment—an employee may be terminated for a good reason, bad reason, or no reason at all—and recognizing that statutory protections are acts of legislative grace). For many years, the relationship between employers and employees was based on the principle that either could terminate the relationship at any time and for any or no reason. Courts and legislatures developed protections for whistleblowers through limited public policy exceptions,

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[4] The language at issue here, "protection to employees of publicly traded companies," stands in contrast to the legislative history relied on in *Hill v. Tennessee Valley Authority*, Nos. 87-ERA-023 and 024, Secretary's Decision and Order of Remand (Dep't of Labor May 24, 1989), which confirmed that the anti-retaliation provision in the Energy Reorganization Act "provide[s] protection to *employees of* commission licensees, applicants, *contractors, or subcontractors*," *see* H.R. Rep. No. 95-1796, pt. 10, at 16 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7304, 7309 (emphasis added).

engaging in piecemeal efforts that respected the traditional underpinnings of the common law. *See* Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 Wash. L. Rev. 1029, 1044-45, 1049 (2004).

For this reason, it makes sense to read Section 806 in light of the presumption that Congress intended to retain the substance of the common law, *i.e.* that Congress intended to retain at-will employment principles, with respect to private employees. *See Kirtsaeng*, 133 S. Ct. at 1363.

To abrogate a common law principle, a statute must speak directly to the question addressed by the common law and must be clear. *See Samantar v. Yousef*, 560 U.S. 305, 130 S. Ct. 2278, 2290-91, 2292 (2010); *United States v. Texas*, 507 U.S. 529, 534 (1993). And where the proposed statutory interpretation would be more onerous than the common law, it is logical to conclude that the common law remains applicable. *See Texas*, 507 U.S. at 536. Here, construing Section 806 to apply to private company employees would be more onerous because it would create the risk of potential liability for millions of small businesses that otherwise would have very little exposure from whistleblower claims arising from the discovery and reporting by their employees of complex financial fraud.

In the absence of any affirmative expression of Congressional intent to impose liability upon private businesses, and in particular, small businesses, there is no basis for reading Section 806 in the way Petitioners suggest. *Cf. Foremost-McKesson, Inc. v. Provident*, 423 U.S. 232, 252 (1976) (declining to adopt "construction that best serves the statute's purposes"

where doing so would impose harsh liability on the basis of unclear language). This reasoning is particularly apt in cases such as this, where other means exist to protect whistleblowers. *See id.* at 255; Nancy M. Modesitt, *The* Garcetti *Virus*, 80 U. Cin. L. Rev. 137, 141-42 (2011) (identifying claims available to dismissed employees pursuant to public policy and State and Federal law); Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection Law*, 38 Am. Bus. L.J. 99 (2000) (surveying varied State-law protections for whistleblowers); Sara A. Corello, Note, *In-House Counsel's Right to Sue for Retaliatory Discharge*, 92 Colum. L. Rev. 389, 390-95 (1992) (recognizing development of retaliatory discharge claims, as exception to at-will doctrine, for whistleblowers reporting employer's wrongdoing); *see, e.g., Shea v. Emmanuel Coll.*, 682 N.E.2d 1348, 1350 (Mass. 1997) (recognizing retaliatory discharge claim for Massachusetts employees). Indeed, it is not unusual for Congress to limit the scope of whistleblower protections. *See* Part II, *infra*.

B. Applying Section 806 to Private Companies Will Have a Deleterious Effect on Small Businesses.

The consequences of engrafting liability that runs contrary to existing common-law principles are apparent in the likely practical effect on small businesses that contract with public companies. *Cf. Kirtsaeng*, 133 S. Ct. at 1364-67. Consider an employee who is one of five employees of a small business who wonders if she has discovered financial indiscretions at a public company customer. This employee might be habitually late to work, disruptive, or might even have recently caused the business to

lose a different customer. Alternatively, the employee may be a model employee, but changes in economic circumstances may require the small business to let her go. In either case, retaining the employee could significantly hinder the business going forward. Yet, under Petitioners' preferred reading of the statute, a decision to terminate the employee could expose the business to a fact-intensive retaliation claim that, even if unfounded, must be defended. That is an expense with which small businesses are all too familiar.[5]

The specter of litigation is a constant cause for worry among small businesses. Creating new forms of lawsuits in an area where employers are traditionally free to make unhindered personnel decisions increases exposure to frivolous and abusive litigation by disgruntled employees and increases costs by fostering litigation of retaliation claims. This is particularly true when the supervisor is both the person to whom the complaint about the publicly-traded company was reported and the person responsible for any subsequent adverse employment decision. Retaining an underperforming employee for fear of litigation has a greater impact on a small business than on a company employing hundreds or thousands.

Even those businesses that encounter no such problems are likely to incur significant costs if subjected to liability under Section 806. Small business

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[5] Small businesses bear a disproportionate burden of tort litigation costs. In 2008, small businesses accounted for 81 percent of tort liability costs (excluding medical malpractice), but earned only 22 percent of total revenue. *Tort Liability Costs for Small Business* at 1, 9, A-8 Exhibit 3 (2010), http://www.institute forlegalreform.com/sites/default/files/ilr_small_business_2010_0.pdf.

owners generally are responsible for all aspects of their business—they typically do not employ human resource specialists, compliance officers, or in-house counsel. To minimize their exposure to liability under Section 806, small businesses that provide services to public companies will need to allocate resources to learning about the regulations and implementing compliance protocols that do not relate to the nature of their business. Small businesses already pay approximately 36 percent ($2,830 per employee) more than large businesses for compliance-related expenses alone.[6] The burden imposed by Petitioners' construction of the whistleblower protections of Section 806 is thus proportionately greater on smaller companies. This disparity will only increase if small businesses are subjected to regulations not previously applied to them.

Expanding Section 806 to protect private company employees would do more than subject small businesses to new forms of litigation; it could stifle fledgling businesses and impede growth by requiring them to divert time and resources from running their business to investigating complaints and preventing or defending lawsuits. Even if terminated or disciplined employees do not pursue retaliation claims, the attendant risks are too serious, too extensive, and too predictable to dismiss them as insignificant, especially in this litigation-happy era. *Cf. Kirtsaeng*, 133 S. Ct. at 1366-67; *see also Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. ___, 133 S. Ct. 2517, 2531-32 (2013).

Moreover, the uncertainty created by expanding Section 806 could result in lost business with public

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[6] Nicole V. Crain & W. Mark Crain, Small Bus. Admin., *The Impact of Regulatory Costs on Small Firms* 7, Table 1 (2010).

companies. Respondents argue that Section 806 imposes secondary liability on officers, employees, contractors, subcontractors, and agents. *See* Resp'ts' Br. at 13, 16 & n.3, 24. If Petitioners' construction is adopted, the same argument could be made that public companies may be secondarily liable for their contractors' personnel decisions with regard to the contractors' own employees. If public companies are concerned that they could be exposed to this liability, they may become less willing to contract with private companies and instead hire employees of their own. Small business owners would feel the impact acutely, as the services they perform move in-house.

Notwithstanding these significant implications, Petitioners contend that it is not sensible to limit Section 806 protections to employees of publicly-traded or reporting companies because a contractor or subcontractor cannot engage in prohibited retaliation, *i.e.* "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions or employment," against the public company's employees, only its own. *See* 18 U.S.C. § 1514A(a). This argument is baseless. Section 806 is stated in the disjunctive, meaning that the retaliating party need not be able to engage in each type of prohibited conduct to be subject to the statute's provisions. For instance, so long as the actor can threaten, harass, or discriminate against the public company's employee, it can violate the provision. *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (finding statutory disjunctive means not all elements need be satisfied; for instance, a person may be injured in his property and eligible to sue under the Clayton Act even though he has no business that was harmed). Certainly contractors or subcontractors can discharge *or* harass (or threaten or discriminate against); the

latter three terms all have meaning when applied to contractors and subcontractors.

More importantly, contractors and subcontractors can engage in each kind of the employment actions proscribed by Section 806. Consider a consulting company under contract to conduct an internal investigation. If it learns that an employee of the public company has been selling secrets to a competitor while at the same time blowing the whistle on financial improprieties, the consultant could recommend terminating the employee, and if the company follows the consultant's advice, the consultant would have come within the statute, even without having discharged the employee.

* * *

Congress has taken care in crafting detailed regulatory regimes for entities in the securities and financial ,industries. Congress has also employed deliberate language when protecting employees from retaliation. It is thus counter-intuitive to suggest that—without any clear statement in support—Congress eschewed careful statutory drafting in favor of a broad, indiscriminate, and far-reaching change in existing law. *Cf. Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. ___, 131 S. Ct. 2296, 2303, 2304 (2011) (concluding Congress is responsible for reapportioning liability among entities "in the securities industry in light of the close relationship between investment advisers and mutual funds," and that the Court must give narrow dimensions to an implied cause of action, much as the Court should narrowly construe statutes that change the common law); *Engquist*, 553 U.S. at 607 (determining that proposed claim would undo careful statutory work in other contexts).

This Court should not unleash the consequences that would flow from Petitioners' construction when Congress clearly did not do so. "If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. It is beyond [the Court's] province to rescue Congress from its drafting errors, and to provide for what [the Court] might think . . . is the preferred result." *Lamie*, 540 U.S. at 542 (internal quotations and citation omitted). Congress could have exposed every small business that contracts with a public company to the risk of retaliation claims under Section 806 if that was its preferred result. It did not do so. The Court of Appeals' construction of Section 806 is logical, reasonable, consistent with the statute's plain language and Congress's expressed intent, and respectful of the common law foundation for employer-employee relationships. This Court should affirm.

II. THE COURT OF APPEALS' CONSTRUCTION OF SECTION 806 RESPECTS THE FULL CONTEXT OF THE SARBANES-OXLEY ACT.

A. Anti-retaliation Provisions Further the Goals of the Statutes they Support.

Federal whistleblower statutes are enacted to enhance enforcement of broad legislative schemes. Examples of statutes containing whistleblower provisions include Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act of 1967 ("ADEA"), the Americans with Disabilities Act of 1990 ("ADA"), the Aviation and Reform Act for the 21st Century, the Clean Air Act, the False Claims Act, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), the

Federal Credit Union Act, and the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"). The provisions of these statutes differ with regard to the individuals covered, the conduct protected, and the prerequisites for making a retaliation claim. These differences support the inference that Congress takes care to enact whistleblower provisions in order to further the specific underlying statutory scheme, while minimizing the negative cost impact on employers.

In all of these statutes, Congress has tailored whistleblower provisions to fit the perceived breadth of the harm. FIRREA, for example, was enacted in the wake of the savings and loan scandals of the 1980s, in part, "to enhance the regulatory and enforcement powers of Federal financial institutions regulatory agencies." Pub. L. No. 101-73, preamble, 103 Stat. 183 (1989). Accordingly, the statute provides whistleblower protections to those depository bank employees who make disclosures regarding illegality or gross mismanagement to one of the Federal banking agencies or the attorney general.[7] 12 U.S.C. § 1831j(a)(1). The provision does not protect all reporters of violations. Congress determined that it could achieve its regulatory goals of enhancing financial industry enforcement with specific protections directed to bank employees who report potential violations to the government—the entity best suited to investigate and address the concerns. In that regard, Congress drafted a provision with a defined scope (much like the provisions at issue here). *See Lippert*

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[7] A separate provision applies to employees of any Federal banking agency, Federal home loan bank, Federal reserve bank, or someone performing services on behalf of the Federal Deposit Insurance Corporation. 12 U.S.C. § 1831j(a)(2).

v. Cmty. Bank, Inc., 438 F.3d 1275, 1279-80 (11th Cir. 2006) ("[G]ranting protected status to bank employees who complain internally poses increased risks of interfering with normal workplace relations within a bank and substantially expands the notion of 'whistleblowing,' beyond that apparently contemplated by the instant statute.").

Other banking whistleblower provisions are similarly targeted to achieving the overarching regulatory goals. *See Schroeder v. Greater New Orleans Fed. Credit Union*, 664 F.3d 1016, 1023 (5th Cir. 2011) (citing cases limiting the scope of the whistleblower protections of the Fair Credit Union Act, 12 U.S.C. § 1790b); *Hill v. Mr. Money Fin. Co. & First Citizens Banc Corp.*, 309 F. App'x 950, 960 (6th Cir. 2009) (recognizing limitations of the whistleblower protections afforded by the Federal Deposit Insurance Act, 31 U.S.C. § 5328).

In contrast, environmental protection laws, the violation of which threatens public health and safety, offer considerably broader whistleblower coverage. The protections extend to employees of any company and cover not only those who disclose violations, but also those who assist in halting and prosecuting such violations. *See, e.g.*, Clean Air Act § 312, 42 U.S.C. § 7622; Water Pollution Control Act § 2, 33 U.S.C. § 1367; CERCLA § 110, 42 U.S.C. § 9610; Safe Drinking Water Act § 1450, 42 U.S.C. § 300j-9(i); Toxic Substance Control Act § 23, 15 U.S.C. § 2622; Solid Waste Disposal Act § 7001, 42 U.S.C. § 6971. With respect to nuclear safety, the anti-retaliation provision goes even further, protecting those individuals who report violations internally. Energy Reorganization Act § 211, 42 U.S.C. § 5851. These more comprehensive provisions reflect recognition of the seriousness of

the potential harm and the need to "encourage employees to aid in the enforcement of these statutes by raising substantiated claims through protected procedural channels." *Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor*, 992 F.2d 474, 478 (3d Cir. 1993).

Even the statutes providing broader whistleblower protection are not all-encompassing, however. For example, the Court of Appeals for the Sixth Circuit held that a contractor at a nuclear power plant could not be liable under the Energy Reorganization Act whistleblower provision for terminating an employee who complained about the practices of another contractor at the same plant. *Am. Nuclear Res., Inc. v. U.S. Dep't of Labor*, 134 F.3d 1292, 1296 (6th Cir. 1998). The decision reflected an implicit recognition that such complaints do little to advance the goals of the underlying statute. *Id.* ("Nothing in the record indicates how [the employee]'s conduct could force [the employer] to change its procedures or incur extra costs.").

The landmark antidiscrimination statutes contain the broadest whistleblower provisions. Title VII, the ADEA, and the ADA all prohibit discriminatory employment and labor practices across virtually every industry. Each of these laws also includes expansive protections for persons who complain of such discriminatory practices or participate in a discrimination investigation or lawsuit. *See* Title VII, 42 U.S.C. § 2000e-3; ADEA, 29 U.S.C. § 623(d); ADA, 42 U.S.C. § 12203. These protections are broad in that they extend not just to employees, but also to prospective employees, and they cover all manner of conduct meant to protect those who oppose the illegal conduct. *See* Title VII, 42 U.S.C. § 2000e-3; ADEA, 29

U.S.C. § 623(d); ADA, 42 U.S.C. § 12203. The antidiscrimination provisions work only if employees and prospective employees are able to report such actions without fear of retribution.

Yet even in connection with those statutes, where the anti-retaliation provisions were drafted so as to have the broadest reach, Congress drafted carve-outs to protect small businesses. *See Clackamas Gastroenterology Assocs., P. C. v. Wells*, 538 U.S. 440, 446-47 (2003); *U.S. E.E.O.C. v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1281 (7th Cir. 1995); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510 (4th Cir. 1994). Congress recognized the need to shield vulnerable businesses from the impact of these otherwise broad provisions by excluding very small businesses from the scope of these laws. *See* 29 U.S.C. § 630(b) (defining "employer" under the ADEA as a firm having twenty or more employees); 42 U.S.C. § 2000e(b) (defining "employer" under Title VII as a firm having fifteen or more employees); 42 U.S.C. § 12111(5) (same).[8] The fact that Sarbanes-Oxley did not require such exclusions is further evidence that it was not intended to reach privately-held companies; by limiting the scope to public companies, Congress did not need to be concerned with employers of fewer than twenty (or fifteen) employees.

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[8] A fourth antidiscrimination statute, the Equal Pay Act, 29 U.S.C. § 206(d), does not exclude small businesses from its reach, but it protects a very discrete form of discrimination: disparate pay based on sex. In that sense, it is much more limited than its antidiscrimination counterparts.

B. Expanding Section 806 to Protect Private Company Employees Goes Well Beyond the Purposes of the Sarbanes-Oxley Act.

On the spectrum of whistleblower protection statutes, Section 806 lies much closer to the banking laws than to environmental or antidiscrimination provisions. The Sarbanes-Oxley Act of 2002 was enacted for the purpose of "protect[ing] investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws." Pub. L. No. 107-204, preamble, 116 Stat. 745 (2002). It established a public company accounting oversight board and strengthened audit requirements for public companies; increased public disclosures; and imposed new rules to hold officers and directors accountable for the benefit of shareholders of public companies.

As both sides in this case repeatedly acknowledge, Sarbanes-Oxley was enacted "in the wake of the Enron collapse," Pet'rs' Br. at 2; *see also* Resp'ts' Br. at 11, which, like the scandals involving Adelphia, Tyco, and WorldCom, affected investors in these public companies. It is, put simply, a statute intended to regulate *public* companies. *See Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 9 (1st Cir. 2006) ("The Sarbanes–Oxley Act itself is a major piece of legislation bundling together a large number of diverse and independent statutes, all designed to improve the quality of and transparency in financial reporting and auditing of public companies."); *see also* 148 Cong. Rec. H5462, H5474 (daily ed. July 25, 2002) (statement of Rep. Etheridge) (Sarbanes-Oxley "regulates public corporations, not privately-held companies . . . [because] [b]y accepting money from private citizens, these corporations bear a special

responsibility to their investors and need to be held accountable").

The Court of Appeals' construction honors this intention and avoids the significant negative impact on small businesses that would result from an alternative interpretation proffered by Petitioners. Section 806 is triggered anytime an employee reports "any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities and commodities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." Sarbanes-Oxley Act of 2002, § 806(a)(1), Pub. L. No. 107-204, 116 Stat. 745. This reference to the mail fraud and wire fraud statutes renders the provision particularly broad and applicable to virtually any suspicion of financial misconduct. *See* Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771, 772 (1980) ("First enacted in 1872, the mail fraud statute, together with its lineal descendant, the wire fraud statute, has been characterized as the 'first line of defense' against virtually every new area of fraud to develop in the United States . . . . During the past century, both Congress and the Supreme Court have repeatedly placed their stamps of approval on expansive use of the mail fraud statute." (footnote omitted)). Moreover, an employee need merely "provide information" regarding a perceived fraud to "a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)" to invoke the protections of the statute. Sarbanes-Oxley Act, § 806(a)(1).

Under Petitioners' argument, a Section 806 claim by an employee of a private company would not even require a nexus between the financial impropriety and a public company. Instead, such a construction would extend protection to any employee at any company (including the contractor itself) so long as the contractor has at least one public company client. An employee who even hints at financial improprieties by either the employer or the employer's clients (regardless of whether those clients are public or private) could trigger a "retaliation claim" that would subject a small business to an unacceptable risk of liability. There is no basis to conclude that Congress intended to extend the reach of the statute beyond the general intent of Sarbanes-Oxley to protect against fraud at *public* companies.

Imposing on small businesses regulations that are intended to ensure financial transparency at public companies is a misalignment of the means and the ends. Adopting the alternative construction properly rejected by the Court of Appeals would not produce the results intended under Sarbanes-Oxley but instead would impose an unreasonable burden on the resources of small businesses.

CONCLUSION

Section 806 is part of a comprehensive statutory scheme intended to increase transparency and strengthen controls by public companies. Imposing the Sarbanes-Oxley whistleblower protections on *private* companies does nothing to promote those goals. On the other hand, the potential costs to small businesses are tremendous. The NFIB Legal Center respectfully submits that the Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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October 7, 2013

AMICUS CURIAE BRIEF

No. 12-3

IN THE

Supreme Court of the United States

JACKIE HOSANG LAWSON AND
JONATHAN M. ZANG,

Petitioners.

v.

FMR LLC, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

BRIEF OF AMICI CURIAE NEW ENGLAND LEGAL FOUNDATION AND ASSOCIATED INDUSTRIES OF MASSACHUSETTS IN SUPPORT OF RESPONDENTS

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October 7, 2013

BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. THE SARBANES-OXLEY WHISTLEBLOWER PROVISION DOES NOT PROTECT THE EMPLOYEES OF A PUBLIC COMPANY'S PRIVATE CONTRACTORS AND SUBCONTRACTORS, BECAUSE THOSE ENTITIES ARE INCLUDED SOLELY IN THEIR CAPACITY AS REPRESENTATIVES OF THE PUBLIC COMPANY, AND NOT AS EMPLOYERS IN THEIR OWN RIGHT. 6

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Bowen v. Massachusetts,
487 U.S. 879 (1988) 19

Braswell v. United States,
487 U.S. 99 (1988) 10

Brotherhood of R. R. Trainmen v. Baltimore & O. R. Co., 331 U.S. 519 (1947) 15

Gustafson v. Alloyd Co.,
513 U.S. 561 (1995) 9

Gutierrez v. Ada,
528 U.S. 250 (2000) 12

Jarecki v. G. D. Searle & Co.,
367 U.S. 303 (1961) 9, 12

Jones v. Harris Assoc.'s L.P.,
559 U.S. 335 (2010) 18

Miles v. Apex Marine Corp.,
498 U.S. 19 (1990) 19

Pacific Operators Offshore, LLP v. Valladolid,
132 S. Ct. 680 (2012) 16

Smith v. United States,
508 U.S. 223 (1993) 8

United States v. Williams,
553 U.S. 285 (2008) 9, 11

STATUTES

12 U.S.C. § 1441(b)(6)(B) 10

12 U.S.C. § 1452(c)(9) 10

12 U.S.C. § 2278b-4(a)(3) 10

12 U.S.C. § 5301 20

15 U.S.C. § 77dd 10

15 U.S.C. § 80a-2(20) 5

15 USC. §§ 80a-1-64) 17

18 U.S.C. § 1514A(a) ..... *passim*

42 U.S.C. § 2000e-3(a) 14

Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111–203, 124 Stat. 1376 5

Section 922(b) 19

Section 922(c) 19

Section 929A 19

Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, § 806 15

OTHER AUTHORITIES

148 Cong. Rec. S1787-88 (daily ed. Mar. 12, 2002) 16

149 Cong. Rec. S1725 (daily ed. Jan. 29, 2003) 14

Bradley Mark Nerderman, *Should Courts Apply Dodd-Frank's Prohibition on the Enforcement of Pre-Dispute Arbitration Agreements Retroactively?*, 98 Iowa L. Rev. 2141 (2013) 13

S. Rep. No. 107-146 (2002) 13

S. Rep. No. 91–184 (1969) 17, 18

INTEREST OF AMICI CURIAE

Amici curiae New England Legal Foundation ("NELF") and Associated Industries of Massachusetts ("AIM") seek to present their views, and the views of their supporters, on the issue presented in this case, namely whether the whistleblower anti-retaliation provision of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A(a), applies solely to the employees of a public company, or whether that provision also protects the employees of a privately held company that contracts with the public company.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

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[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amici, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.3(a), amici also state that, on July 18 and on July 31, 2013, counsel for respondents and counsel for petitioners respectively filed with this Court a general written consent to the filing of amicus briefs, in support of either or neither party.

AIM is a 97-year-old nonprofit association, with over 5,000 employer members doing business in the Commonwealth. AIM's mission is to promote the well-being of its members and their employees, and the prosperity of the Commonwealth of Massachusetts, by improving the economic climate of Massachusetts, advocating fair and equitable public policy proactively, and by providing relevant and reliable information and excellent services.

NELF and AIM are committed to ensuring a reasonable interpretation of statutes regulating the business community, and to preserving the separation of powers that honors Congress's policy choices and limits a court's role to enforcing and not expanding those policy choices. Amici are particularly concerned about this case because the respondents are Massachusetts companies, and because the mutual fund industry has a strong presence in the Commonwealth. Therefore, a decision of this Court will have an immediate and widespread effect on amici's local business community.

Where, as here, a statute protects only the employees of a public company, courts should adhere to Congress's policy choice and should not expand the scope of the statute by applying the statute to employees of a privately held company. In this connection, NELF has filed many other amicus briefs before this Court, advocating successfully for the enforcement of federal statutory limits on a business's liability.[2]

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[2] *See, e.g., Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013) (standard of but-for causation, and not mixed-motive liability, applies to Title VII retaliation claims); *Vance v.*

For these and other reasons provided below, amici believe that their brief would provide an additional perspective to aid this Court in deciding the issue of statutory construction presented in this case.

SUMMARY OF ARGUMENT

The Sarbanes-Oxley ("SOX") whistleblower provision, 18 U.S.C. § 1514A(a), applies solely to employees of public companies. Private contractors and subcontractors are named in this provision solely in their capacity as *representatives* of the public company, and not as employers in their own right. Thus, while contractors and subcontractors cannot threaten or harass the whistleblowing employees of a public company, the provision does not protect the contractors' and subcontractors' *own* employees, such as petitioners here.

This interpretation is compelled by the clear context of those key statutory terms. Contractors and subcontractors are included in a list of a public company's traditional representatives and agents--

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Ball State, 133 S. Ct. 2434 (2013) (employer vicariously liable for hostile work environment under Title VII only when harassing employee is capable of taking tangible employment actions against victim); *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (Federal Arbitration Act requires enforcement of class action waivers in arbitration of federal statutory claims); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (FAA preempts State law effectively requiring class arbitration as condition of enforcing consumer arbitration agreements); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007) (National Bank Act, 12 U.S.C. §§ 21 *et seq.*, preempts state regulation of wholly-owned subsidiary of national bank).

"any *officer*, *employee*, contractor, subcontractor, or *agent* of such [public] company." 18 U.S.C. § 1514A(a) (emphasis added). Under the basic canon of statutory construction, *noscitur a sociis* ("it is known from its associates"), a statutory term should be limited to a meaning that is consistent with its neighboring terms, to achieve a unified list of terms sharing a common purpose. Conversely, the *noscitur a sociis* canon counsels against interpreting a statutory term broadly, in isolation from its accompanying terms. Contractors and subcontractors should therefore be interpreted solely as representatives of the public company, consistently with the function of their neighboring terms--officers, employees, and agents of a public company.

While contractors and subcontractors are indeed separate entities from the public company, they also resemble a public company's officers, employees, and agents because they are contractually bound to serve the public company's interests. In fact, SOX was enacted precisely to prevent the accounting and reporting abuses that apparently arose from the *contractual* relationship between certain prominent publicly traded companies and their accounting firms. Hence it is not surprising that Congress has protected a public company's whistleblowing employee from the potential adverse actions of both his employer *and* the employer's contractor.

In this connection, it should be noted that the SOX whistleblower provision is *not* limited to the employer's tangible employment actions and instead

covers all kinds of threats or harassment against the whistleblowing employee, actions that could be committed as much by a third-party contractor as by a representative of the employer.

It should have been no surprise to Congress that many employees of the mutual fund industry, i.e., the employees of private investment advisors, would effectively fall outside the scope of the SOX whistleblower provision. Congress knew for several decades that mutual funds, which are considered public companies under the whistleblower provision, typically have no employees of their own. Instead, mutual funds generally rely on the contractual services of their investment advisers, many of which are private companies, as in this case. In fact, the Investment Company Act of 1940 was enacted precisely to regulate and prevent the potential abuses arising from this unique *contractual* relationship between mutual funds and their investment advisers. Significantly, the 1940 Act defines an "investment adviser" as one "who *pursuant to contract with such [investment] company* regularly furnishes advice to such company . . . ." 15 U.S.C. § 80a-2(20) (emphasis added). And Congress is presumed to know the state of existing law when it enacts a new statute. Thus, the SOX whistleblower provision's effective omission of many employees of the mutual fund industry could hardly have been an oversight and may be interpreted as a deliberate policy choice.

Finally, it should be noted that, while the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") amended the

SOX whistleblower provision in certain respects, Dodd-Frank made no changes whatsoever to the provision's disputed "any officer" clause, which contains the only reference to contractors and subcontractors. Therefore, in amici's view, Congress has yet to include the employees of private investment advisers within the scope of the whistleblower provision. A decision in this case should therefore *not* be limited to claims arising under the SOX whistleblower provision before it was amended by Dodd-Frank in 2010. Instead, the Court's decision should apply equally to claims arising after Dodd-Frank's effective date, unless and until Congress provides otherwise.

ARGUMENT

I. THE SARBANES-OXLEY WHISTLEBLOWER PROVISION DOES NOT PROTECT THE EMPLOYEES OF A PUBLIC COMPANY'S PRIVATE CONTRACTORS AND SUBCONTRACTORS, BECAUSE THOSE ENTITIES ARE INCLUDED SOLELY IN THEIR CAPACITY AS REPRESENTATIVES OF THE PUBLIC COMPANY, AND NOT AS EMPLOYERS IN THEIR OWN RIGHT.

At issue in this case is whether the whistleblower anti-retaliation provision of the Sarbanes-Oxley Act of 2002 ("SOX"), 18 U.S.C. § 1514A(a), applies solely to the employees of a public company, or whether that provision also protects the employees of a privately held company that contracts with the public company. The relevant language of the SOX whistleblower

provision reads: "No [public] company . . . , *or any officer, employee, contractor, subcontractor, or agent of such company*, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an *employee* [who engages in protected activity] . . . ." 18 U.S.C. § 1514A(a) (emphasis added).[3] The limited meaning of the word

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[3] The SOX whistleblower provision applicable to the claims in this case provided in full:

> § 1514A. Civil action to protect against retaliation in fraud cases
>
> "(a) Whistleblower protection for employees of *publicly traded companies*.—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78*l*), *or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d))*, or *any officer, employee, contractor, subcontractor, or agent of such company*, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against *an employee* in the terms and conditions of employment because of any lawful act done by *the employee*—
>
> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities or commodities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

"employee" in this provision becomes clear when examined in the context of the entire provision. "Language, of course, cannot be interpreted apart from context. The meaning of a word that appears ambiguous if viewed in isolation may become clear when the word is analyzed in light of the terms that surround it." *Smith v. United States*, 508 U.S. 223, 230 (1993).

It is undisputed that the provision bars certain public companies from discriminating against their own employees for engaging in protected whistleblower activity. At issue is whether the provision, via its "any officer" clause quoted above, also applies to a public company's contractors in their capacity as employers, or whether the

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> (A) a Federal regulatory or law enforcement agency;
>
> (B) any Member of Congress or any committee of Congress; or
>
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
>
> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C. § 1514A(a) (emphasis added).

provision applies to such contractors solely in their capacity as *representatives* of the public company. If the former were true, then the provision would bar a public company's contractors from threatening or harassing a public company's employees *and* their own employees. In the latter case, however, contractors would be barred solely from threatening or harassing a public company's employees.

Resolution of this issue of statutory construction turns on a commonsense reading of the "any officer" clause, which prohibits a public company's *officers*, *employees*, contractors, subcontractors, and *agents* from discriminating against an employee. The logical starting point for this inquiry is the basic rule of statutory construction that "a word is known by the company it keeps." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). According to "the commonsense canon of *noscitur a sociis* ['it is known from its associates'] . . . a word is given more precise content by the *neighboring words* with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008) (emphasis added). Under this canon of construction, statutory terms that "are susceptible of multiple and wide-ranging meanings," *id.*, should be limited to a meaning that is consistent with their neighboring terms, to form a unified list of terms serving a common purpose. *See id.* After all, no statutory term is an island. "[I]t does not stand alone, but gathers meaning from the words around it." *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961).

Application of this basic rule of statutory construction makes it immediately apparent that the

words "contractor" and "subcontractor" are embedded in a list of terms--officers, employees, and agents--that identify a public company's *representatives* or agents. Officers, employees, and agents act *on behalf* of the public company, which is an artificial entity that cannot act on its own and instead must act through its representatives. *See Braswell v. United States*, 487 U.S. 99, 110 (1988) ("Artificial entities such as corporations may act only through their agents . . . ."). In fact, Congress has frequently used that same triumvirate of terms--officers, employees, and agents--in many other statutes when defining the power of a corporation to act through its representatives.[4] As with these other federal statutes, the "any officer" clause here merely reflects the basic principle of corporate law that a company must act through its officers, employees, and agents. And the whistleblower provision bars those corporate representatives from mistreating the company's whistleblowing employees.

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[4] *See, e.g.*, 12 U.S.C. § 2278b-4(a)(3) (Financial Assistance Corporation has power to "provide for such *officers, employees, and agents* . as may be necessary [and to] define their duties ") (emphasis added); 12 U.S.C. § 1441(b)(6)(B) (Financing Corporation may "authorize the *officers, employees, or agents* of the Federal Home Loan Banks to act for and on behalf of the Financing Corporation in such manner as may be necessary to carry out the functions of the Financing Corporation.") (emphasis added); 12 U.S.C. § 1452(c)(9) (Federal Home Loan Mortgage Corporation may "appoint, employ, and fix and provide for the compensation and benefits of *officers, employees*, attorneys, and *agents*.") (emphasis added); 15 U.S.C. § 77dd (Corporation of Foreign Security Holders has power "to select, employ, and fix the compensation of *officers*, directors, members of committees, *employees*, attorneys, and *agents* of the Corporation . . . .") (emphasis added).

Accordingly, "the commonsense canon of *noscitur a sociis*," *United States v. Williams*, 553 U.S. at 294, instructs that the inclusion of contractors and subcontractors in this list of a public company's officers, agents, and employees should be interpreted consistently with the *representative* function of those surrounding terms. To harmonize all of the terms in this list, then, the Court should limit a public company's contractors and subcontractors to their capacity as representatives of the public company, and not as employers in their own right. As with the public company's officers, employees, and agents, which begin and end this statutory list of terms, contractors and subcontractors may not harass a public company's whistleblowing employees. However, the provision does not regulate the employment relationship between a private contractor or subcontractor and its *own* employees.

This contextually focused interpretation of the statutory terms contractor and subcontractor is supported by the Court's decisions applying the *noscitur a sociis* canon when interpreting similar statutory lists of terms. In those cases, the Court has refused to interpret a statutory term broadly, in isolation from its accompanying terms. Instead, the Court has narrowed the meaning of a term to fit its specific context. *See United States v. Williams*, 553 U.S. at 294-295 (applying *noscitur a sociis* canon to narrow meaning of terms "promotes" and "presents" to transactional context of accompanying terms "advertises," "presents," and "solicits" in list of forbidden actions in federal child pornography statute); *Gutierrez v. Ada,* 528 U.S. 250, 254–258

(2000) (applying *noscitur a sociis* canon to limit meaning of disputed statutory phrase "any election" to surrounding terms that refer specifically to gubernatorial elections); *Jarecki v. G. D. Searle & Co.*, 367 U.S. at 307-09 (applying *noscitur a sociis* principle to restrict statutory term "discoveries" to discoveries of mineral resources, where term occurs in list of words applying solely to oil, gas, and mining industries). In short, these decisions instruct that the terms "contractor" and "subcontractor" should be defined by their immediate statutory context in the SOX whistleblower provision. Therefore, contractors and subcontractors are regulated solely as representatives of the public company and are barred from mistreating the public company's whistleblowing employees.

While contractors and subcontractors are indeed separate entities from the public company, often with their own employees, they also resemble their neighboring terms--a public company's officers, employees, and agents--because they too are contractually bound to serve the public company's interests. In fact, SOX was enacted precisely to prevent the accounting and reporting abuses that apparently arose from the *contractual* relationship between certain prominent publicly traded companies, such as Enron, and their accounting firms, such as Arthur Andersen. As the Senate has explained:

> With the *assistance of [Arthur] Andersen and its other auditors*, Enron apparently successfully deceived the investing public and reaped millions for

> some select few insiders. To the outside world, *Enron and its auditors* were either not reporting their massive debt at all, or were making disclosures [that] were obtuse [and] did not communicate the essence of [Enron] transactions completely or clearly . . . . In short, through the use of sophisticated professional advice and complex financial structures, Enron *and Andersen* were able to paint for the investing public a very different picture of the company's financial health than the true picture revealed. . . .

S. Rep. No. 107-146, 2002 WL 863249, at *3 (2002) (emphasis added). *See also* Bradley Mark Nerderman, *Should Courts Apply Dodd-Frank's Prohibition on the Enforcement of Pre-Dispute Arbitration Agreements Retroactively?*, 98 Iowa L. Rev. 2141, 2149 (2013) ("Congress passed SOX, the precursor to Dodd-Frank, to prevent future *accounting* scandals similar to those at Enron and WorldCom . . . and to regulate the *financial and auditing processes* of publicly traded companies.") (emphasis added).

Hence it is not surprising, in light of the market scandals that precipitated SOX's passage, that Congress included contractors and subcontractors in its list of a public company's more traditional representatives--officers, employees, and agents. That is, Congress enacted the SOX whistleblower provision to protect an employee of a public company from the potential adverse actions of

both his employer and the employer's accounting firm, or any other such contractor, whenever the employee reports potential securities violations committed by either his employer, the employer's contractor, or both entities working in combination.

In this connection, it should be noted that the SOX whistleblower provision is *not* limited to the employer's tangible employment actions, such as termination or demotion--decisions that ordinarily exceed a contractor's powers. Instead, the whistleblower provision is worded broadly to include all kinds of threats or harassment against the whistleblowing employee--actions that could be committed as much by a third-party contractor as by a representative of the employer. In particular, SOX provides that an employer and its representatives "may [not] discharge, demote, suspend, *threaten, harass, or in any other manner discriminate against an employee* . . . ." 18 U.S.C. § 1514A(a) (emphasis added). Congress has even noted that the whistleblower provision "was intentionally written to *sweep broadly*, protecting any *employee of a publicly traded company* who took such reasonable action to try to protect investors and the market." 149 Cong. Rec. S1725 (daily ed. Jan. 29, 2003) (statement of Sen. Leahy) (post-enactment) (emphasis added). By contrast, a typical anti-retaliation provision, such as that found in Title VII, applies solely to an employer's retaliatory acts: "It shall be an unlawful employment practice for an *employer* to discriminate against any of his employees [for engaging in protected activity under Title VII] . . . ." 42 U.S.C. § 2000e-3(a) (emphasis added).

Clearly, the broad scope of forbidden retaliatory acts in Sox's whistleblower provision reflects the salient congressional concern that a public company might commit securities violations with the assistance or complicity of its accounting firm, or some such contractor, as the Enron scandal itself apparently illustrated. Therefore, Congress likely anticipated that a public company's employee who attempts to expose such potential securities violations could expect hostility or opposition from either or both his employer and the employer's contractor, acting on behalf of the employer.

In sum, a commonsense interpretation of the provision's key language, bolstered by its historical context, establishes that Congress intended to protect a *public* company's employees from all potential sources and kinds of retaliatory acts. Any possible doubt concerning the whistleblower provision's exclusive application to a public company's employees is dispelled by considering the title that Congress originally provided to the SOX section that contains the whistleblower provision, and to the provision's original caption, which is preserved in the provision's codified form. *See Brotherhood of R. R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 529 (1947) (statutory captions are useful "when they shed light on some ambiguous word or phrase"). Both the title and caption refer solely to protection for employees of publicly traded companies. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, § 806 ("Protection for Employees of *Publicly Traded* Companies Who Provide Evidence of Fraud" (emphasis added)); 18 U.S.C. § 1514A(a) ("Whistleblower protection for

employees of *publicly traded* companies") (emphasis added). The legislative history also shows that Congress focused exclusively on protecting employees of public companies.[5] Thus, Congress has, from the outset, defined the whistleblower provision as affording protection solely to the employees of public companies.

Congress could have chosen to extend whistleblower protection to the employees of a private entity that contracts with a public company in the preparation of SEC-related financial information. However, Congress has not provided any such protection in the SOX whistleblower provision. Any possible expansion of this provision to include the employees of a private contractor is purely a matter of policy for Congress to decide. As the Court has recently explained, "policy concerns cannot justify an interpretation of [a statute] that is inconsistent with [its] text . . . . If Congress' coverage decisions are mistaken as a matter of policy, it is for Congress to change them. We should not legislate for them." *Pacific Operators Offshore, LLP v. Valladolid,* 132 S. Ct. 680, 690 (2012).

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[5] *See, e.g.*, 148 Cong. Rec. S1787 (daily ed. Mar. 12, 2002) (statement of Sen. Leahy) (whistleblower provision "would provide whistleblower protection to *employees of publicly traded companies* who report acts of fraud[.]") (emphasis added). *See also id.* at S1788 ("[T]here is [currently] no . . . protection for *employees of publicly traded companies* who blow the whistle on fraud and protect investors.") (emphasis added); 156 Cong. Rec. S3349 (daily ed. May 6, 2010) (statement of Sen. Cardin) (post-enactment) ("The whistleblower provisions of the Sarbanes-Oxley Act protect *employees of the publicly traded companies* . . .") (emphasis added).

It should also be noted that Congress has long been aware of the fact that, as in this case, mutual funds, which are considered public companies under the SOX whistleblower provision, typically have no employees of their own. Instead, mutual funds are generally managed by investment advisers, many of which are private companies, as in this case. Hence, it should have been no surprise to Congress, and in fact may have been a deliberate policy choice, that many employees of the mutual fund industry, i.e., the employees of private investment advisors, would effectively fall outside the scope of the SOX whistleblower provision. "Mutual funds, with rare exception, *are not operated by their own employees.* Most funds are formed, sold, and managed by external organizations [investment advisers], that are separately owned and operated." S. Rep. No. 91–184 (1969), *reprinted in* 1970 U.S.C.C.A.N 4897, 4901 (accompanying the 1970 amendments to the Investment Company Act of 1940, 15 USC. §§ 80a-1-64)).

In fact, the Investment Company Act of 1940, which regulates mutual funds and other such investment companies, defines an investment adviser as one "who *pursuant to contract with such [investment] company* regularly furnishes advice to such company with respect to the desirability of investing in, purchasing or selling securities . . . ." 15 U.S.C. § 80a-2(a)(20)(A) (emphasis added). And, as the Court has explained, Congress enacted the 1940 Act precisely to regulate the potential abuses that inhere in the *contractual* relationship between an investment adviser and the mutual funds that it creates and manages:

> Congress adopted the [Investment Company Act of 1940, and the 1970 amendments to that Act] because of its concern with *the potential for abuse inherent in the structure of investment companies*. . . . Recognizing that the relationship between a fund and its investment adviser was *fraught with potential conflicts of interest*, the Act created protections for mutual fund shareholders[, such as Board and shareholder approval requirements for advisor's fees, and Board neutrality requirements].

Jones v. Harris Assoc.'s L.P., 559 U.S. 335, 339 (2010) (citations and internal quotation marks omitted).[6]

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[6] The Senate has elaborated in even greater detail on the potential abuses arising from the fact that mutual funds have no employees of their own and are instead dependent on management by investment advisers. *See* S. Rep. No. 91–184, *reprinted in* 1970 U.S.C.C.A.N at 4901 ("Because of the *unique structure of this industry*[,] the relationship between mutual funds and their investment adviser is not the same as that usually existing between buyers and sellers or in conventional corporate relationships. Since a typical fund is organized by its investment adviser[,] which provides it with almost all management services[,] and because its shares are bought by investors who rely on that service, a mutual fund cannot, as a practical matter sever its relationship with the adviser. Therefore, the forces of arm's-length bargaining do not work in the mutual fund industry in the same manner as they do in other sectors of the American economy.") (emphasis added).

Therefore, it is not surprising, and perhaps no accident, that the SOX whistleblower provision does not protect many of the employees of the mutual fund industry, namely, the employees of private investment advisers. "We assume that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). *See also Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988) ("[It is a] well-settled presumption that Congress understands the state of existing law when it legislates . . . ."). Existing law, in the 1940 Act, defines investment advisers as *contracting parties* for mutual funds, and regulates this unique *contractual relationship* between mutual funds and their investment advisers in much detail. The power rests solely with Congress in its wisdom, and not with the courts by interpretive fiat, to change these clear policy decisions.

Finally, it should be noted that, while the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111–203, 124 Stat. 1376 ("Dodd-Frank"), has amended SOX's whistleblower provision to include, *inter alia*, employees of a public company's subsidiaries or affiliates, Dodd-Frank has *not* made any changes whatsoever with respect to contractors and subcontractors. 18 U.S.C. § 1514A(a) (as amended by §§ 922(b),(c), and 929A of Dodd-Frank, Pub. L. No. 111-203). That is, Dodd-Frank leaves intact the disputed "any officer" clause, which contains the only reference to contractors and subcontractors in the whistleblower provision. Therefore, in amici's view, Congress has yet to include private investment advisers within the scope of this provision.

Accordingly, a decision of the Court in this case should not be limited to claims, such as this one, that arise before Dodd-Frank's amendment of the SOX whistleblower provision. Instead, the Court's decision should apply equally to claims arising after Dodd-Frank's effective date of July 22, 2010. *See* note to 12 U.S.C. § 5301 ("Effective Date").

In sum, a commonsense reading of the SOX whistleblower provision clearly shows that private contractors and subcontractors are included solely in their capacity as a public company's representatives, consistently with the neighboring terms of a public company's officers, employees, and agents. As such, contractors and subcontractors cannot retaliate against the public company's employees. But the provision simply does not regulate the employment relationship between a private contractor or subcontractor and its *own* employees. Only Congress can change this policy choice.

CONCLUSION

For the reasons stated above, NELF and AIM respectfully request that this Court affirm the judgment of the First Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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AND
BRIEFS

No. 12-3

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IN THE

Supreme Court of the United States

JACKIE HOSANG LAWSON AND JONATHAN M. ZANG,

Petitioners,

v.

FMR LLC, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 7

I. THE ARB'S CONSTRUCTION WOULD DRAMATICALLY EXPAND SECTION 806 LIABILITY WITHOUT ANY POLICY JUSTIFICATION 7

II. THE ARB'S CONSTRUCTION IS NOT ENTITLED TO *CHEVRON* DEFERENCE 16

A. Section 806's Fractured Administrative Model Dictates That *Chevron* Deference Is Inappropriate 17

B. The Secretary Has Withheld Interpretive Authority From The ARB 24

C. The ARB's Interpretation Of Section 806 Does Not Call Upon Agency Expertise 27

D. Congress Did Not Delegate A Question Of This Magnitude 28

CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Ship Bldg. Co. v. NLRB,
380 U.S. 300 (1965).....30

Bowen v. Am. Hosp. Ass'n,
476 U.S. 610 (1986).....18

Bureau of Alcohol, Tobacco and Firearms v. Fed. Labor Relations Auth.,
464 U.S. 89 (1983).....31, 32

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City of Arlington v. FCC,
133 S. Ct. 1863 (2013).....16

DeNaples v. OCC,
706 F.3d 481 (D.C. Cir. 2013).....17

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000).....28, 29

Gonzales v. Oregon,
546 U.S. 243 (2006).....16, 17, 19, 28

Iavorski v. INS,
232 F.3d 124 (2d Cir. 2000).....27

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987).....27, 28

Lockheed Martin Corp. v. Admin. Review Bd.,
717 F.3d 1121 (10th Cir. 2013).....9

Martin v. OSHRC,
499 U.S. 144 (1991).....18, 19, 27

MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.,
512 U.S. 218 (1994).....29

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166 F.3d 225 (3d Cir. 1999).....27

Smiley v. Citibank (South Dakota), N.A.,
517 U.S. 735 (1996).....16

Sutton v. United Air Lines, Inc.,
527 U.S. 471 (1999).....17

United States v. Mead Corp.,
533 U.S. 218 (2001).....16, 17, 22

Whitman v. Am. Trucking Ass'ns,
531 U.S. 457 (2001).....28

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5 U.S.C. § 704.....20

15 U.S.C. § 78j-1.....23, 31

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15 U.S.C. § 78o-6.....14

15 U.S.C. § 7215 14

15 U.S.C. § 7245 14

18 U.S.C. § 1341 10

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29 U.S.C. § 553 22

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29 C.F.R. § 1980.105 ..... 20, 23

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29 C.F.R. § 1980.110 ..... 20, 23

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Procedures for Handling Section 806 Complaints, 69 Fed. Reg. 52,104 (Aug. 24, 2004) .. 17, 22, 25, 26

Procedures for Handling Section 806 Complaints, 76 Fed. Reg. 68,084 (Nov. 3, 2011) 25

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67 Fed. Reg. 65,008 (Oct. 22, 2002).....25

Brown v. Lockheed Martin Corp.,
ARB No. 10-050 (ARB Feb. 28, 2011) 8, 10, 19

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ARB Nos. 09-002, -003
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ARB Nos. 10-111, -115
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Sylvester v. Parexel Int'l LLC,
ARB No. 07-123,
(ARB May 25, 2011).....9, 15, 23

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INTEREST OF *AMICUS CURIAE*

This *amicus curiae* brief is filed on behalf of the Securities Industry and Financial Markets Association (SIFMA).[1] SIFMA is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers across the country. It regularly files *amicus curiae* briefs in cases that raise issues of vital concern to participants in the securities industry, like the present one.

SIFMA's members have a direct interest in the proper interpretation of the whistleblower protections set forth in Section 806 of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act or Act). 18 U.S.C. § 1514A. As participants in the securities industry, SIFMA's members are subject to a vast and complicated regulatory structure that aims to strengthen corporate governance, improve risk management, and foster trust and confidence in the financial markets, while promoting investor opportunity, capital formation, job creation, and economic growth.

SIFMA's members share these objectives. Achieving them requires a careful balance. Congress struck that balance in Section 806, creating whistleblower protections for employees of public companies

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[1] The parties have consented to the filing of this brief by filing letters with the Clerk of the Court granting blanket consent to the filing of *amicus curiae* briefs. No counsel for any party authored this brief in whole or in part and no party or counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than SIFMA, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

who report alleged wrongdoing occurring under their employers' roofs. The construction of Section 806 advocated by Petitioners and the Government before this Court would dramatically expand Section 806 liability far beyond the outer boundaries established by Congress. Even the most conscientious public and private companies—including, potentially, many of SIFMA's members—would suddenly be exposed to a new and unjustified wave of civil litigation that does nothing to advance the shareholder protection goals underlying Sarbanes-Oxley. Due to their many variegated and unique relationships with public companies, the consequences for SIFMA's members would be particularly severe.

SUMMARY OF ARGUMENT

Section 806 of Sarbanes-Oxley provides that no public company[2]—"or any officer, employee, contractor, subcontractor, or agent of such public company"—may retaliate against "an employee" of such public company for engaging in protected whistleblowing activity. 18 U.S.C. § 1514A(a). The language is clear: Section 806's protections against retaliation extend only to the employees of those public companies, and do not reach the employees of their contractors, subcontractors, or agents. *See* Resp'ts' Br. at 13-24.

Petitioners and the Government nonetheless contend that this Court should defer to the contrary

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[2] The term "public company" is used here to refer to any company that is required to register or file reports under the Securities Exchange Act of 1934. *See* 15 U.S.C. §§ 78l, 78o(d).

construction of Section 806 adopted by the Administrative Review Board (ARB) of the U.S. Department of Labor (DOL) in *Spinner v. David Landau & Associates, LLC*, ARB Nos. 10-111, -115 (ARB May 31, 2012).[3] In *Spinner*, an interlocutory decision issued after the opinion of the Court of Appeals currently under review, the ARB adopted the position that Section 806 protects, in addition to all employees of public companies, all employees of any contractors, subcontractors, or agents of those companies. Pet. App. 136a-167a.

I. The construction of the statute adopted by the ARB would dramatically expand Section 806 liability far beyond anything Congress could have possibly intended. Through Section 806, Congress crafted a discrete remedy carefully tailored to a particular problem. The ARB's interpretation would upset that delicate congressional balance while doing nothing to advance the shareholder protection goals animating Sarbanes-Oxley.

First, placed in the context of the ARB's broader approach to Section 806, it is clear that the ARB's interpretation would result in the proliferation of litigation completely divorced from the Act's shareholder protection subject matter. Despite acknowledging the breadth of potential coverage, the ARB has failed to articulate a workable limiting principle that would cabin the astonishing reach of its construction. Instead, the ARB relies on Section 806's "built-in limitations"—most notably, the re-

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[3] ARB decisions are available at http://www.oalj.dol.gov/public/arb/references/caselists/arbindex.htm.

quirement that an employee have a reasonable belief that one of six categories of enumerated violations has occurred. But because two of those six categories—mail and wire fraud—can reach almost any type of fraudulent conduct, the limitations are illusory. Absent meaningful constraints, the ARB's approach eviscerates Section 806's subject matter limits. Doing so will have wide-ranging, unintended, and deleterious effects on public and private companies.

Second, the ARB's reading of Section 806 in *Spinner* would compound those effects by extending whistleblower protections to all of the potentially *tens of millions* of employees of private contractors, subcontractors, or agents of public companies. Congress deliberately placed the burdens attendant to Section 806 litigation on the shoulders of public companies. Congress purposely stopped short of imposing the same burdens on private companies. Sarbanes-Oxley was a sweeping piece of legislation touching on all manner of issues pertaining to corporate governance, accounting reform, and shareholder protection. Congress never intended Section 806 to be a panacea for all the ills contributing to Enron's collapse.

II. The ARB's sweeping construction of Section 806 is not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The legitimacy of the *Chevron* doctrine rests on a presumption that Congress, when it leaves an ambiguity in a statute, expects the implementing agency to resolve the ambiguity. But when circumstances suggest that

Congress had no such expectation, the presumption falls away. This is just such a case, for several reasons.

First, in crafting Sarbanes-Oxley, Congress eschewed the singular delegation typically required for *Chevron* deference. Instead, it fashioned a uniquely fractured model of administrative authority. Congress divided regulatory responsibilities between two Executive agencies—namely, the DOL, through the Secretary of Labor (Secretary), and the Securities and Exchange Commission (SEC). Congress also allocated the overwhelming majority of authority under the Act—including substantive rulemaking authority—to the SEC, leaving the DOL with a narrow sliver of authority to act as a neutral arbiter of fact in individual Section 806 complaints. Finally, Congress further divided adjudicatory responsibilities under Section 806 between the Executive and the Judiciary, creating a scheme under which the Judiciary will often exercise independent interpretive authority as the sole adjudicator of Section 806 complaints.

Second, the Secretary has failed to allocate authority within the DOL itself in such a way that would vest interpretive authority in the ARB. While the Secretary has sub-delegated to the ARB the authority to act on his behalf in adjudicating Section 806 complaints on a case-by-case basis, he has affirmatively withheld from the ARB any interpretive authority over any matter governed by DOL regulations. In this case, the DOL's Occupational Safety and Health Administration (OSHA)—not the ARB—has issued procedural regulations claiming to speak

directly to the issue of whether Section 806's protections extend to employees of contractors, subcontractors, and agents of public companies. The Secretary has disclaimed any entitlement to *Chevron* deference based on OSHA's procedural regulations, but the Secretary's *post hoc* disclaimer does not change the fact that those regulations purport to answer the interpretive question in *Spinner*. The ARB thus has no authority to offer an authoritative construction of the statute on that same issue.

Third, *Chevron* deference is rooted in an acknowledgment that the Executive almost always has greater expertise than the Judiciary when it comes to matters of policy. Where a court is called upon to engage in an exercise of pure statutory interpretation, it avoids intruding upon the Executive's domain. In *Spinner*, the ARB did not bring any special expertise to bear in support of its reading of Section 806. Instead, it purported to rely on ordinary tools of statutory construction, drawing on the statute's language, structure, legislative history, and relationship to other statutory schemes. Such an effort does not reflect an agency's exercise of policymaking expertise, making *Chevron* deference inappropriate.

Fourth, whether Congress intended to delegate a matter to an Executive agency is informed in part by the nature of the matter at issue. Congress does not "hide elephants in mouseholes." Petitioners and the Government cannot credibly claim that, in enacting Section 806, Congress intended to obliquely and silently delegate away the fundamental question of whether to protect potentially *tens of millions* of employees of private companies and, by extension, im-

pose a new and profound risk of civil liability on potentially *millions* of private companies. The Act's structure and legislative history confirm that Congress did not intend to give the DOL, let alone the ARB, the authority to make such a transformative decision.

ARGUMENT

I. THE ARB'S CONSTRUCTION WOULD DRAMATICALLY EXPAND SECTION 806 LIABILITY WITHOUT ANY POLICY JUSTIFICATION

The negative policy consequences of deferring to the ARB's expansive construction of Section 806 would be vast and severe. Congress determined that reforms were needed after the collapse of Enron "to restore confidence in the integrity of the public markets." S. Rep. No. 107-146, at 11 (2002). Congress responded, in part, with Section 806 of Sarbanes-Oxley. But Congress did not act willy-nilly in creating this new and entirely unprecedented whistleblower program; it fashioned a discrete remedy carefully tailored to a particular problem. The astonishingly expansive construction of Section 806 adopted by the ARB in *Spinner* would overturn the delicate balance struck by Congress more than a decade earlier while doing nothing to advance the shareholder protection goals animating the Act.

To understand the extraordinary reach of the ARB's construction, one must begin with the ARB's extraordinary notion of what constitutes protected activity. To do so, consider the following facts from a

recent case: A public company employee is told by a coworker that her boss has developed sexual relationships with U.S. soldiers stationed overseas and has taken purported "business" trips to rendezvous with those soldiers using company funds. The employee discusses what she heard with one of the company's human resources specialists, who writes an e-mail to the office ethics director identifying the employee as one of several possible sources of information about the episodes. Nine months later, the employer restructures, bringing new personnel into the employee's group. Three more months pass, and the employee, finding the restructuring intolerable, claims to have an emotional breakdown. She then files a Section 806 complaint with the DOL, asserting that she has been constructively—not actually—discharged on the basis of the conversation she had with the human resources specialist a full year earlier about rumors of her boss's misbehavior.

The ARB's view is that this case falls squarely within Section 806. *See Brown v. Lockheed Martin Corp.*, ARB No. 10-050 (ARB Feb. 28, 2011). This is so despite the fact that the employee's secondhand information has no relationship whatsoever to shareholder fraud, a violation of the securities laws, or other core shareholder protection concerns that motivated enactment of that section and Sarbanes-Oxley. In the ARB's judgment, the employee engaged in protected activity under Section 806 because she "reasonably believed that [her boss] engaged in mail and wire fraud." *Id.*, slip op. at 9.[4]

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[4] The decision was later challenged in the Tenth Circuit, with the Court of Appeals ultimately deferring to the ARB's

The facts of *Lockheed* might seem unique, but, in the ARB's world, its approach to Section 806 is not.

Indeed, under the ARB's approach, there are no meaningful subject matter limits to Section 806 litigation. The ARB could not be clearer on this point. It has stated point-blank that "a complainant may be afforded protection for complaining about infractions *that do not relate to shareholder fraud*." *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, slip op. at 20 (ARB May 25, 2011) (emphasis added). This is a troubling notion even for the public companies that are indisputably covered by the statute. Earlier in this case, the District Court acknowledged the consequence of such an expansive approach when addressing Petitioners' parallel construction:

> [Petitioners'] reading might permit [Section 806] to have a notably expansive scope untethered to the purpose of the statute. Any employee of an entity that acts as an officer, employee, contractor, subcontractor or agent of a public company, who involves himself in the reporting of fraud by his own employer, would be a covered employee. This reading suggests that an employee could be protected even when his whistleblowing does not directly involve fraud against public shareholders.

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construction of Section 806. *See Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1130-31 (10th Cir. 2013). The Court of Appeals did not offer any real analysis as to why it believed deference was appropriate.

Pet. App. 111a. Confronted with this consequence, the District Court sought to articulate a "limiting principle" to cabin the reach of Section 806—in the end, concluding that "the statute protects only that whistleblowing activity that relates to fraud against shareholders." *Id.* at 116a. In *Spinner*, the ARB acknowledged that the "theoretical coverage" of its construction "might be broad." *Id.* at 166a. Nonetheless, citing what it saw as Section 806's "built-in limitations," the ARB declined to adopt the District Court's limiting principle, *id.*—or, for that matter, any limiting principle.[5]

The "built-in limitations" are illusory. The ARB cited two: Section 806's "specific criteria for employees to have a reasonable belief of violations of specific anti-fraud laws or SEC regulations" and "its requirement that the protected activity [be] a causal factor in the alleged retaliation." *Id.* However, the ARB's reference to "specific anti-fraud laws" is misleading. Of the six categories enumerated in Section 806(a)(1), two of them—violations of the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343—

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[5] Before the Court of Appeals, the DOL advocated in passing for its own limiting principle—namely, that private companies "have a specified relationship with a public company." C.A. DOL *Amicus* Br. at 27 n.11. Petitioners, for their part, have proffered a constellation of proposals of their own. *See* C.A. Lawson Br. at 15 (arguing that private companies must perform "core professional services" for public companies); C.A. Zang Br. at 11 (suggesting that private companies must have "intimate relationships" with public companies); C.A. Lawson Reply Br. at 2 (contending that the statute reaches private companies that "perform functions regulated by the securities laws").

can reach almost any type of fraud. And, at least under the ARB's jurisprudence, *see, e.g.*, *Lockheed*, *supra*, they require no relationship to shareholder fraud, a violation of the securities laws, or other core shareholder protection concerns.

The upshot of the ARB's approach to Section 806 is that, even with the separate check of the causation requirement, the kind of disclosures that would be eligible for protection under Section 806 needn't have any connection whatsoever to those concerns, either. *See* C.A. Lawson Reply Br. at 6 (conceding that "extending the terms [of Section 806] to include unknowing subcontractors with no ties to a public company's securities law related obligations serves no investor-protection goals"). By unmooring the statute from shareholder protection concerns, the ARB's construction would guarantee the proliferation of Section 806 litigation completely divorced from relevant shareholder protection subject matter.

From there, Section 806 would give rise to mind-boggling permutations of civil liability. Some of the more problematic scenarios—plainly beyond the outer boundaries of anything contemplated by Congress—are outlined by Respondents and other *amici*. But if the Court were to accept the ARB's expansive construction of Section 806, the implications for the hundreds of firms, banks, and asset managers that comprise SIFMA's membership would be especially profound. For example, under the ARB's virtually limitless framework, Section 806 could extend whistleblower protections to an employee of a public company who reports alleged wrongdoing occurring not at her public company employer, but rather at

her employer's *customers or clients*—public or private.

Broker-dealers, for instance, have a legal obligation to "know their customer." FINRA Rule 2090 (2012). This requires broker-dealers to learn all the "essential facts concerning every customer." *Id.* Virtually anything can be relevant to servicing a customer's account, including the customer's personal characteristics, income and net worth, investment objectives, and life goals. As a result, broker-dealers routinely cultivate intimate and trusting relationships with customers that can last years, even decades. Consider a scenario in which a broker-dealer employed by a public company is on the phone with his customer discussing the customer's current financial situation. During the call, the customer reveals that he has lost his job after being caught submitting a false expense report by e-mail, and fears that he will not be able to provide for his family. At the water cooler, the broker-dealer recounts the broad strokes of the customer's story in a casual conversation with his supervisor. Later that week, the broker-dealer is notified of his termination as part of a broad-based reduction-in-force. He invokes Section 806, claiming that he is an "employee" of a public company; his disclosure touches upon a "violation" of the federal wire fraud statute; and his disclosure was made to "a person with supervisory authority" over him.

Similarly, consider an investment banker employed by a public company who is tasked with doing due diligence on a financial transaction. She comes across information that she personally believes evi-

dences mail or wire fraud at a private customer involved in the transaction, but which has no nexus to the transaction itself. She then reports her personal belief to her manager in passing. Under the ARB's approach, she would be free to invoke Section 806 in an effort to evade a looming employment action, wielding the threat of dragging her employer through the costly process of litigating a whistleblower claim despite the fact that her disclosure has no relationship at all to anything that occurred under her employer's own roof. Such a scenario would put the company's legal and compliance departments in an impossible position: they would lack the information or authority to investigate or remediate the customer's alleged wrongdoing, but the company would still be subject to the risk of liability under Section 806. The potential scope of the problem is staggering. A public investment bank could be at risk for the acts of the hundreds of companies with which it deals on a daily basis. The deleterious and unintended effects for public companies would be profound.

The ARB proposes to multiply these effects exponentially by extending Section 806's protections to the employees of certain private companies as well. Specifically, the statutory construction adopted by the ARB would extend whistleblower protections to all of the potentially *tens of millions* of employees of private contractors, subcontractors, or agents of public companies. Pet. App. 141a-166a. Such a construction would yield a radical expansion of Section 806 coverage, far beyond anything Congress could have possibly intended. Congress deliberately placed the great weight of the burdens attendant to

Section 806 litigation squarely on the shoulders of public companies in recognition that special regulatory responsibilities flow from their acceptance of the benefits of public capital. But Congress purposely stopped short of imposing the same burdens on private companies—which, by definition, are not covered by the securities laws.

In this regard, Section 806 cannot be viewed in isolation. Sarbanes-Oxley was a sweeping piece of legislation touching on all manner of issues pertaining to corporate governance, accounting reform, and shareholder protection. The varied and multifaceted reforms enacted by Congress confirm the limited scope of Section 806 and reveal why Petitioners and the Government are wrong to intimate that the "accounting firms, law firms and business consulting firms" that were implicated in the Enron scandal would somehow escape scrutiny if Section 806 is not extended to reach all employees of certain private companies. S. Rep. No. 107-146, at 4. To the contrary, these groups were expressly and meticulously addressed by Congress elsewhere in Sarbanes-Oxley.

For example, Section 105 of the Act subjects outside accountants to sanctions for failing to report suspected fraud to an issuer of securities or, in some instances, to the SEC. *See* 15 U.S.C. § 7215(c)(4). Section 307 requires the SEC to issue rules requiring outside attorneys to report and escalate wrongdoing at public company clients. *Id.* § 7245. And Section 501 requires the SEC to adopt rules to protect the objectivity of securities analysts by prohibiting retaliation for reporting adverse research potentially affecting a client relationship. *Id.* § 78o-6. In each

instance, Congress enacted the carefully tailored reforms that it believed were needed by providing regulation and oversight of many private company employees that serve public companies in connection with core shareholder concerns, like accountants, lawyers, and securities professionals. Congress never intended Section 806 to be a panacea for all the ills contributing to Enron's collapse. *See Sylvester*, ARB No. 07-123, slip op. at 9 (noting that Section 806 "is but one part of a comprehensive law ensuring corporate responsibility").

Section 806 complaints operate at the intersection of securities and employment litigation. They present a series of especially complex and difficult issues, coupling the highly fact-intensive inquiries attendant to employment retaliation claims with thorny questions about securities and other fraud. Given its druthers, the ARB would subject a great number of private U.S. employers to this costly and burdensome form of litigation simply on the basis that they happen to contract with a public company or subcontract with a company that, in turn, contracts with a public company, irrespective of the nature of their business with the public company and the connection, if any, to shareholder concerns.[6]

SIFMA's members actively encourage the internal reporting of good faith and reasonable concerns about wrongdoing affecting or potentially affecting shareholder interests; such reports are motivated by

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[6] The costs and burdens will be borne in part by the Judiciary, which will be tasked with managing the proliferation of Section 806 complaints.

what SIFMA sees as part of its core mission. Nonetheless, the dramatic expansion of Section 806 liability that would follow from the ARB's construction of the statute would expose even the most diligent companies, public and private, to an unprecedented wave of civil litigation while in no way meaningfully furthering the underlying shareholder protection goals of Sarbanes-Oxley.

II. THE ARB'S CONSTRUCTION IS NOT ENTITLED TO *CHEVRON* DEFERENCE

The *Chevron* doctrine, at its core, "is rooted in a background presumption of congressional intent." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013). Specifically, courts "accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left [an] ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996). However, the presumption is far from absolute. "[C]ircumstances implying such an expectation [must] exist," *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001), and "[d]eference . . . is warranted only 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority,'" *Gonzales v. Oregon*, 546 U.S. 243, 255-56 (2006) (quoting *Mead*, 533 U.S. at 226-27).

Those conditions are not satisfied here.

A. Section 806's Fractured Administrative Model Dictates That *Chevron* Deference Is Inappropriate

Chevron deference "is warranted only when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law." *Gonzales*, 546 U.S. at 255-56 (internal quotation marks omitted). "Delegation of such authority may be shown in a variety of ways," *Mead*, 533 U.S. at 227, but "*Chevron* deference . . . is not accorded merely because [a] statute is ambiguous and an administrative official is involved," *Gonzales*, 546 U.S. at 258. Instead, courts must consider the "great variety" of administrative models created by Congress, and then "tailor deference to variety." *Mead*, 533 U.S. at 236. In this case, the Court is faced with a fractured model of regulatory and adjudicatory authority that is "unique" among its peers. Procedures for Handling Section 806 Complaints, 69 Fed. Reg. 52,104, 52,111 (Aug. 24, 2004). This unique structure, which unfolds on two separate axes, dictates that *Chevron* deference is inappropriate.

1. On one axis, Congress divided regulatory responsibilities between different Executive agencies—namely, the DOL and the SEC. Courts recognize that the justification for *Chevron* deference "begin[s] to fall when an agency interprets a statute administered by multiple agencies." *DeNaples v. OCC*, 706 F.3d 481, 487 (D.C. Cir. 2013); *see, e.g.*, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 478 (1999) (observing that the authority to issue regulations under

the Americans with Disabilities Act of 1990 "is split primarily among three Government agencies" and declining to defer to a single agency's interpretation of generally applicable provisions); *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 642 n.30 (1986) (plurality opinion) (holding that because Section 504 of the Rehabilitation Act of 1973 is administered by multiple agencies, "[t]here is . . . not the same basis for deference predicated on expertise"). Because Congress charged multiple agencies with the task of administering Sarbanes-Oxley, deference to the DOL—and, by extension, the ARB—is unwarranted.

Congress' lopsided allocation of responsibilities under the Act to the SEC further weakens the case for *Chevron* deference. In enacting Sarbanes-Oxley, Congress was well aware of the historical experience the SEC has in enforcing the securities laws and monitoring public companies. *See, e.g.*, 148 Cong. Rec. S7350, S7356 (2002) (statement of Sen. Michael Enzi) (taking account of the SEC's "longstanding" interpretations concerning relevant "technical matters"). When it came time to divvy up responsibilities under the Act, Congress allocated the overwhelming majority of regulatory responsibilities and rulemaking authority to the SEC, leaving the DOL, through the Secretary, only a narrow sliver of authority to investigate and adjudicate Section 806 complaints on a case-by-case basis. *See* 18 U.S.C. § 1514A(b). If multiple agencies are charged with administering a statute, courts presume that Congress "intended to invest interpretive power in the administrative actor in the best position to develop" "historical familiarity and policymaking expertise" in the statute's underlying subject matter. *Martin v.*

OSHRC, 499 U.S. 144, 153 (1991). Here, that actor is, if anyone, the SEC, not the DOL and its components.

Further, the justification for *Chevron* deference is largely absent where, as here, Congress has withheld substantive rulemaking authority from the agency claiming a right to deference. As this Court explained in *Martin*, "agency adjudication is a generally permissible mode of lawmaking and policymaking only because . . . unitary agencies . . . also ha[ve] been delegated the power to make law and policy through rulemaking." *Id.* at 154. In this case, the DOL readily concedes that it "does not have substantive rulemaking authority with respect to [Section 806]." C.A. DOL *Amicus* Br. at 18 n.8. The mere fact that the DOL, acting through the ARB, must on occasion apply Section 806 on a case-by-case basis when adjudicating individual complaints does not entitle it to claim *Chevron* deference. *Cf. Gonzales*, 546 U.S. at 264 ("[T]he Attorney General must . . . evaluate compliance with federal law in deciding whether to prosecute; but this does not entitle him to *Chevron* deference."). Rather, "the more plausible inference is that Congress intended to delegate to the [agency] the type of nonpolicymaking adjudicatory powers typically exercised by a *court* in the agency-review context." *Martin*, 499 U.S. at 154. Quite simply, Congress intended the DOL to perform the discrete function of acting as a "neutral arbiter" of fact in individual disputes under Section 806, *id.* at 155 (internal quotation marks omitted), nothing more and nothing less.

2. Even as a neutral arbiter of fact, the DOL's role is limited. That is because, on the second axis, Congress further divided adjudicative responsibilities under Section 806 between the Executive and the Judiciary. Under administrative law's traditional division of authority between courts and agencies, a right to judicial review arises only upon "final agency action." 5 U.S.C. § 704; *see, e.g.*, 28 U.S.C. §§ 2342, 2344; 29 U.S.C. §§ 160, 660. With Section 806, however, Congress consciously fashioned a scheme under which the Judiciary would be the sole adjudicator of Section 806 complaints in the absence of a final agency order. On the one hand, in cases in which the DOL's administrative process comes to completion and the ARB issues a final order,[7] either

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[7] The DOL's administrative process is divided into four stages. At the first stage, OSHA conducts an investigation into a newly filed Section 806 complaint and issues a preliminary order. 29 C.F.R. §§ 1980.104(a), 1980.105(a) (2013). If the parties do not object to OSHA's preliminary order, that order becomes binding and is not subject to further review, including judicial review. *Id.* § 1980.106(b). At the second stage, if the parties object to OSHA's preliminary order, an Administrative Law Judge (ALJ) holds a formal hearing and issues a new order. *Id.* §§ 1980.106(a), 1980.107(b), 1980.109(a). If the parties do not petition for review of the ALJ's order, that order becomes binding and is not subject to further review, including judicial review. *Id.* § 1980.110(a). At the third stage, if the parties petition for review, the ARB decides whether to grant or deny discretionary review. If the ARB denies the petition, the ALJ's order becomes the final order of the agency, *id.* § 1980.110(b), and is subject to judicial review in the Courts of Appeals just as if it were an order of the ARB, *id.* § 1980.112(a). At the fourth and final stage, if the ARB grants the petition, it issues a final order in its own name. *Id.* § 1980.110(c). That order is similarly subject to judicial review in the Courts of Appeals. *Id.* § 1980.112(a). As a practical matter, the ARB

side may seek judicial review of the ARB's determination in the Courts of Appeals in accordance with the Administrative Procedure Act. 18 U.S.C. § 1514A(b)(2)(A); 49 U.S.C. § 42121(b)(4)(A). On the other hand, in cases in which the ARB fails to issue a final decision within 180 days of the filing of the complaint—which, as a practical matter, is virtually all of the Section 806 complaints filed with the DOL—the complainant may proceed directly to District Court with a new complaint. 18 U.S.C. § 1514A(b)(1)(B); *see also* 29 C.F.R. § 1980.114(a).

By the DOL's own account, this split adjudicative model is *sui generis*:

> This provision authorizing a Federal court complaint is unique among the whistleblower statutes administered by the Secretary. This statutory structure creates the possibility that a complainant will have litigated a claim before the agency, will receive a decision from an administrative law judge, and will then file a complaint in Federal court while the case is pending on review by the Board. The Act might even be interpreted to allow a complainant to bring an action in Federal Court after receiving a final decision from the Board, if that decision was issued more than 180 days after the filing of the complaint.

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rarely denies discretionary review of ALJ decisions, meaning that most orders reviewed by the Judiciary will have been issued by the ARB itself.

Procedures for Handling Section 806 Complaints, 69 Fed. Reg. at 52,111. Because Section 806 complaints are unlikely to run the full administrative gauntlet in 180 days, many cases will be decided *de novo* by the Judiciary, which will thus be charged with construing the statute in the first instance. By allocating independent and parallel adjudicative authority to the Judiciary, Congress made it clear that it did not intend the DOL, let alone the ARB, to exercise interpretive authority over Section 806. *Cf. Mead*, 533 U.S. at 232 (noting that "any precedential claim of a classification is counterbalanced by the provision for independent review . . . by the [Court of International Trade]").

It is also worth pausing to note that the Secretary—the congressional delegatee—has not reserved any authority to review, modify, or reverse the ARB's decisions. *See* Secretary's Order 1-2010, 75 Fed. Reg. 3,924, 3,924 (Jan. 25, 2010); *see also* David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 204 (2001) ("If the congressional delegatee of the relevant statutory grant of authority takes personal responsibility for the decision, then the agency should command obeisance, within the broad bounds of reasonableness, in resolving statutory ambiguity; if she does not, then the judiciary should render the ultimate interpretive decision."). Indeed, the internal agency framework adopted by the Secretary actually inverts the kind of agency structure that theoretically could command *Chevron* deference. Under that framework, the preliminary decisions of the Assistant Secretary of Occupational Safety and Health, who is appointed by the President with the advice and consent of the

Senate, 29 U.S.C. § 553, are subject to review by the ARB, which is an adjudicatory board comprised of up to five politically unaccountable members appointed by the Secretary for terms of two years or less, Secretary's Order 1-2010, 75 Fed. Reg. at 3,924-25. *See* 29 C.F.R. §§ 1980.105(a), 1980.110(a).[8] Under such circumstances, the Court should decline to defer to the ARB.[9]

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[8] As the case comes before this Court, the question of whether the Secretary's sub-delegation of his adjudicatory authority under Section 806 to the ARB complies with the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2, is not at issue.

[9] Recently, the ARB's lack of political accountability has erupted in a series of outcome-oriented decisions eviscerating nearly a decade of administrative rulings—as well as an established body of law carefully cultivated by the federal courts—and inventing entirely new whistleblower protections that simply have no basis in the statutory text. *See, e.g.*, *Sylvester*, ARB No. 07-123 (departing from prior administrative rulings or judicial precedent on at least five points, including the requirement that complainants show that their internal reports "definitively and specifically" relate to shareholder fraud); *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, -003 (ARB Sept. 13, 2011) (concluding that the inclusion of a complainant's identity in a litigation hold memorandum constituted a *per se* adverse action by violating the whistleblower's "right to confidentiality" under Section 301 of the Act, 15 U.S.C. § 78j-1(m), when that section creates no right of confidentiality); *Vannoy v. Celenese Corp.*, ARB No. 09-118 (ARB Sept. 28, 2011) (holding that a complainant who misappropriated confidential personal employee information for hundreds of employees and then provided that information to a third party could still be protected if his misappropriation was part of an effort to make a complaint to authorities).

In the final analysis, Congress simply did not confer interpretive authority on the DOL or its subdelegatees, including the ARB. Instead, it envisioned a discrete function for the agency—investigating and adjudicating Section 806 complaints as a neutral arbiter of fact and applying the law as developed by the Article III courts. By fashioning a unique and fractured approach to regulatory and adjudicatory authority under Sarbanes-Oxley, Congress eschewed the singular delegation required for *Chevron* deference.

B. The Secretary Has Withheld Interpretive Authority From The ARB

Further compounding the fractured administrative model crafted by Congress is the way in which the Secretary has elected to allocate his authority under Section 806 within the DOL itself. *See* 18 U.S.C. § 1514A(b)(1) (authorizing the Secretary to adjudicate disputes under Section 806). As explained below, even assuming, *arguendo*, that the Secretary has some interpretive authority under Section 806, he has failed to allocate that authority internally in such a way that would allow the ARB to plausibly claim an entitlement to *Chevron* deference here.

Since 2002, the Secretary has delegated to the ARB the authority to act on his behalf "in review or on appeal" in connection with Section 806 complaints. Secretary's Order 1-2010, 75 Fed. Reg. at 3,924; *see also* Secretary's Order 02-2012, 77 Fed. Reg. 69,378, 69,378-79 (Nov. 16, 2012). But at the same time, the Secretary has explicitly withheld

from the ARB any interpretive authority over any matter governed by DOL regulations. *See* Secretary's Order 1-2010, 75 Fed. Reg. at 3,925 ("The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions."). Instead, in the case of Section 806, the Secretary has tried to lay that authority, if anywhere, at OSHA's feet. *See* Secretary's Order 5-2002, 67 Fed. Reg. 65,008, 65,008 (Oct. 22, 2002) (delegating "authority and assigned responsibility for administering" the Section 806 whistleblower program to the Assistant Secretary for Occupational Safety and Health); *see also* Secretary's Order 1-2012, 77 Fed. Reg. 3,912, 3,912 (Jan. 25, 2012).

OSHA—not the ARB—has already issued procedural regulations claiming to speak to the scope of protections under Section 806. *See* Procedures for Handling Section 806 Complaints, 69 Fed. Reg. 52,104; 29 C.F.R. § 1980.101 (2011).[10] These procedural regulations reflect OSHA's own view that Section 806 "protects the employees of publicly traded companies as well as the employees of contractors,

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[10] Citations here are to the regulations in effect at the time *Spinner* was decided. Subsequent to the ARB's decision, OSHA issued revised regulations to implement changes required by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, §§ 922(b) & (c), 929A, 124 Stat. 1376, 1848, 1852 (2010). *See* Procedures for Handling Section 806 Complaints, 76 Fed. Reg. 68,084 (Nov. 3, 2011); Procedures for Handling Section 806 Complaints, 76 Fed. Reg. 78,150 (Dec. 16, 2011).

subcontractors, and agents of those publicly traded companies." Procedures for Handling Section 806 Complaints, 69 Fed. Reg. at 52,106. Although OSHA's view of the ambit of Section 806 is plainly erroneous, the Court need not pass on that issue here because the Secretary has already disclaimed any entitlement to *Chevron* deference based on OSHA's concededly "procedural" regulations. C.A. DOL *Amicus* Br. at 18 n.8; *see also* Procedures for Handling Section 806 Complaints, 69 Fed. Reg. at 52,105 (characterizing the regulations as "procedural in nature"). Rather, what is significant for present purposes is that OSHA has promulgated regulations that purport to speak directly to the issue of whether Section 806's protections extend to employees of contractors, subcontractors, and agents of public companies—the same interpretive question that lies at the heart of *Spinner*. The ARB acknowledged this very fact when deciding *Spinner*, recognizing that it was "obliged to follow" the regulations delineating the scope of Section 806. Pet. App. 142a; *see also id.* at 153a ("[T]he ARB is bound by the DOL regulations."). By operation of the Secretary's allocation of responsibilities within the DOL, the ARB was without authority to pass judgment on, or depart from, the interpretation proffered in OSHA's procedural regulations. *See* Secretary's Order 1-2010, 75 Fed. Reg. at 3,924-25. Or, put differently, because the ARB's construction of Section 806 was controlled by OSHA's procedural regulations, it cannot be considered an authoritative construction of the statute.

C. The ARB's Interpretation Of Section 806 Does Not Call Upon Agency Expertise

"[H]istorical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency." *Martin*, 499 U.S. at 153; *see, e.g.*, *Chevron*, 467 U.S. at 865 (addressing an agency's "reasonable accommodation of manifestly competing interests" in the context of a "technical and complex" regulatory scheme). But in construing Section 806, the ARB made no attempt to bring any special expertise to bear in support of its reading of the statute. Instead, the ARB ostensibly relied on ordinary tools of statutory construction, drawing on the statute's language, structure, legislative history, and relationship to other statutory schemes. Pet. App. 141a-167a. Such an effort simply does not reflect an agency's exercise of its institutional competence to make policy by giving statutory language "concrete meaning through a process of case-by-case adjudication." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987); *see also Iavorski v. INS*, 232 F.3d 124, 133 (2d Cir. 2000) (Sotomayor, J.) ("When, as here, [a court is] called upon to engage only in an exercise of statutory interpretation, [it] avoid[s] the danger of venturing into areas of special agency expertise, concerning which courts owe special deference under the *Chevron* doctrine.").

Because the proper reading of Section 806 "is not one that implicates agency expertise in a meaningful way," *Sandoval v. Reno*, 166 F.3d 225, 239 (3d Cir. 1999), but rather presents "a pure question of statutory construction for the courts to decide,"

Cardoza-Fonseca, 480 U.S. at 446, deference under *Chevron* is not warranted.

D. Congress Did Not Delegate A Question Of This Magnitude

Whether Congress intended to delegate a matter to an Executive agency "is shaped, at least in some measure, by the nature of the question presented." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). In particular, it is well established that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). In this case, Petitioners and the Government cannot credibly claim that, in enacting Section 806, Congress intended to silently delegate away the fundamental question of whether to protect potentially *tens of millions* of employees of private companies and, by extension, impose a new and profound risk of civil liability on potentially *millions* of private companies. "When Congress chooses to delegate a power of this extent," *Gonzales*, 546 U.S. at 265, it does so explicitly, not through implication and innuendo. Particularly where the agency's proffered interpretation would have far-reaching consequences, this Court has consistently refused to find *Chevron* deference appropriate based on "oblique" and "cryptic" statutory language. *See, e.g., id.* at 258, 267, 284 n.3 (citing "[t]he importance of the issue of physician-assisted suicide" as "mak[ing] the oblique form of the claimed delegation all the more suspect" even though there was no dispute that the statutory language at issue

was "open to varying constructions, and thus ambiguous in the relevant sense" or that the agency actor had the power to promulgate rules with the force of law); *Brown & Williamson*, 529 U.S. at 159-60 (concluding that Congress would not "cryptic[ally]" delegate a question of "economic and political importance" affecting "an industry constituting a significant portion of the American economy").

MCI Telecommunications Corp. v. American Telephone & Telegraph Co., 512 U.S. 218 (1994), is illustrative. There, the Court faced the question of whether the Federal Communications Commission's authority to "modify" any requirement of a tariff-filing provision of the Federal Communications Act of 1934 encompassed the power to make tariff-filing optional for all non-dominant long-distance carriers. *Id.* at 220. The Court concluded that it was "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements." *Id.* at 231. Such a "fundamental revision of the statute," the Court wrote, "may be a good idea, but it was not the idea Congress enacted into law." *Id.* at 231-32.

Similarly, in crafting Sarbanes-Oxley, Congress was well aware of the dangerous sweep the Act would have if extended to private companies—a recurring theme in the congressional debates. As of 2010, nearly all of the 5,734,538 employers in the United States were privately held; only 3,716, or

0.06%, were listed on a U.S. stock exchange.[11] *See* John Asker *et al.*, *Corporate Investment and Stock Market Listing: A Puzzle?* 3, 6 (Apr. 22, 2013), *available at* SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1603484. Congress openly acknowledged that "private companies . . . make up the vast majority of companies across the country." 148 Cong. Rec. S7350, S7351 (daily ed. July 25, 2002). It would not have resorted to silence or "seemingly irreconcilable complexity," Pet. App. 174a, to delegate the basic question of whether to cover the potentially millions of private companies that contract with public companies, subcontract with private companies that, in turn, contract with public companies, or serve as agents of public companies. Absent explicit congressional intent to the contrary, "major policy decisions" of this kind are reserved for Congress, not for an administrative tribunal like the ARB. *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965).

The Act's structure and legislative history confirm that Congress never intended to delegate the major policy decision of whether Section 806 should be applied to private companies. Senator Sarbanes, the Act's principal sponsor in the Senate, was "very clear that [Sarbanes-Oxley] applies exclusively to public companies—that is, to companies registered with the Securities and Exchange Commission." 148 Cong. Rec. S7350, S7351 (2002); *see also* 148 Cong. Rec. H1544, 1544 (2002) (statement of Rep. Michael

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[11] Even among companies with five hundred or more employees, private firms still accounted for 86.4% of all companies and 68.7% of all non-government employment.

Oxley). Likewise, the Senate Judiciary Committee Report, in discussing the provision that would become Section 806, used the phrase "employees of publicly traded companies" no less than half a dozen times. *See* S. Rep. No. 107-146, at 10, 13, 18, 19, 30. Consistent with this common understanding, Congress twice reiterated that Section 806 is limited to "employees of publicly traded companies" in the Act itself—once in the title of Section 806 and once in the caption in the first line of text in 18 U.S.C. § 1514A(a). And, notably, Congress elected to make the mirror image of Section 806's enforcement provision—namely, the new obligation to maintain internal compliance systems for reviewing and responding to internal employee complaints—applicable only to public companies. 15 U.S.C. § 78j-1(m)(4). Meanwhile, when Congress actually intended to create broader whistleblower protections or to regulate private companies, it made its intent clear. *See* Resp'ts' Br. at 35-36. All this is potent evidence that Congress did not intend to leave the question of Section 806's impact on private companies unanswered.

Nor can Petitioners or the Government conjure a basis for deference by citing Sarbanes-Oxley's purportedly "broad remedial purpose." Pet. App. 165a. In *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89 (1983), the Federal Labor Relations Authority (FLRA)—an independent body vested with both formal rulemaking and adjudicatory authority—defended its reading of a provision of the Civil Service Reform Act of 1978 requiring the authorization of "official time" for an employee's participation in collective bargaining

negotiations as also mandating the payment of a per diem allowance and travel expenses by pointing to what it viewed as the "policies underlying the Act," including "a new vision of collective bargaining." *Id.* at 99. Despite statutory "silence" on the precise interpretive question, *id.*, this Court declined to defer to the FLRA based on its invocation of the statute's remedial purpose, *id.* at 107-08. The Court stated that although "Congress unquestionably intended to . . . make the collective-bargaining process a more effective instrument," *id.* at 107, Congress did not "confer on the FLRA an unconstrained authority to equalize the economic positions of union and management," *id.* at 108. Here too, while there is no doubt that Congress intended Sarbanes-Oxley to create a new regime of accountability for public companies, it did not employ silence to cryptically authorize the DOL to impose unprecedented compliance obligations on a substantial component of the U.S. economy.

For the foregoing reasons, whether considered independently or collectively, the ARB's decision in *Spinner* is not entitled to *Chevron* deference.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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BRIEFS

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IN THE

Supreme Court of the United States

JACKIE HOSANG LAWSON AND
JONATHAN M. ZANG,

Petitioners,

v.

FMR LLC, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF FOR *AMICUS CURIAE* THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTERESTS OF THE AMICUS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. APPLYING SECTION 806 TO EMPLOYEES OF PRIVATE ENTITIES WOULD UNDULY BURDEN HUMAN RESOURCE PROFESSIONALS AND THEIR COMPANIES 3

A. The Application of Section 806 to Private Companies Will Swamp Human Resource Professionals With Time-Consuming Investigations 4

B. An Expansive Reading of Section 806 Would Encourage Misuse by Employees to Avoid Adverse Employment Actions by Their Employers 7

C. Applying Section 806 to Private Companies Will Expose Them to Burdensome Litigation 12

II. THE LEGISLATIVE HISTORY UNEQUIVOCALLY DEMONSTRATES THAT CONGRESS DID NOT INTEND SECTION 806 TO APPLY TO EMPLOYEES OF PRIVATE COMPANIES 17

III. CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

CASES

Allen v. Admin. Review Bd.,
514 F. 3d 468 (5th Cir. 2008) 10

Arbaugh v. Y & H Corp.,
546 U.S. 500, 126 S. Ct. 1235 (2006) 21

Astoria Fed. Sav. & Loan Ass'n v. Solimino,
501 U.S. 104, 111 S. Ct. 2166 (1991) 20

Central Bank of Denver, N.A. v. First Interstate Bank of Denver,
511 U.S. 164 (1994) 15

Clark County School Dist. v. Breeden,
532 U.S. 268 (2001) 15

Day v. Staples, Inc.,
555 F. 3d 42 (1st Cir. 2009)..... 10

Fleszar v. U.S. Dep't of Labor,
598 F. 3d 912 (7th Cir. 2010) 14

Isbrandtsen Co. v. Johnson,
343 U.S. 779, 72 S. Ct. 1011 (1952) 20

Menendez v. Halliburton, Inc.,
ARB Case No. 09-002 (ARB Sept. 13, 2011) 12

Office Depot, Inc. v. National Union Fire Ins. Co.,
734 F. Supp. 2d 1304 (S.D. Fla. 2010) 12

Platone v. FLYI, Inc.,
ARB Case No. 04-154 (Sept. 29, 2006) 10

Riddle v. First Tenn. Bank,
497 Fed. Appx. 588 (6th Cir. 2012)..... 10, 11

Samantar v. Yousuf,
560 U.S. 305, 130 S. Ct. 2278 (2010) 21

Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.,
552 U.S. 161, 128 S. Ct. 761 (2008) 4, 15, 16

Sylvester v. Parexel International, LLC,
ARB Case No. 07-123 (May 25, 2011)..... 10

University of Texas Southwestern Medical Center v. Nassar,
133 S. Ct. 2517 (2013) ..... passim

Van Asdale v. Int'l Game Tech.,
577 F. 3d 989 (9th Cir. 2009) 10, 11

Welch v. Chao,
536 F. 3d 269 (4th Cir. 2008) 10

Wiest v. Lynch,
710 F. 3d 121 (3d Cir. 2013)..... 11

STATUTES

18 U.S.C. § 1514A(b)(1)(B)..... 15

29 U.S.C. § 630(b) 21

42 U.S.C. § 2000e(b) 21

42 U.S.C. § 12111(5)(A) 21

29 USC § 2611(4)(A)(i) 21

Section 806 of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A ..... passim

OTHER AUTHORITIES

29 C.F.R. § 1980.103(a) 14

29 C.F.R. § 1980.105(c) 14

29 C.F.R. § 1980.106(a) 14

29 C.F.R. § 1980.110(a) 15

29 C.F.R. § 1980.114(a) 15

148 Cong. Rec. 1787-88 (daily ed. Mar. 12, 2002) 19

148 Cong. Rec. H5474 (daily ed. July 25, 2002) 20

148 Cong. Rec. S7351 (daily ed. July 25, 2002) 20

Occupational Health & Safety Administration, WHISTLEBLOWER INVESTIGATION DATA: FY2005-FY2013 Q3, http://www.whistleblowers.gov/whistleblower/wb_data_FY05-13-Q3.pdf (2013) 13, 16

S. Rep. no. 107-146 ..... 17, 18

SHRM Human Capital Benchmarking Book (2013) 6

INTERESTS OF THE AMICUS[1]

The Society for Human Resource Management ("SHRM") is the world's largest association devoted to human resource management. SHRM represents more than 250,000 members in over 140 countries. The purposes of the Society, as set forth in its bylaws, are to promote the use of sound and ethical human resource management practices in the profession, and (a) to be a recognized world leader in human resource management; (b) to provide high-quality, dynamic, and responsive programs and service to its customers with interests in human resource management; (c) to be the voice of the profession on human resource management issues; (d) to facilitate the development and guide the direction of the human resource profession; and (e) to establish, monitor, and update standards for the profession. As an influential voice, the Society advances the human resource profession to ensure that human resources is recognized as an essential partner in developing and executing organizational strategy.

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[1] Pursuant to Supreme Court Rule 37.2, the *Amicus* states that all parties have consented to the filing of this brief. SHRM expresses its appreciation to the parties for providing this consent. Pursuant to Supreme Court Rule 37.6, the *Amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amicus*, its members, or their counsel made a monetary contribution to this brief's preparation or submission.

SHRM offers this *Amicus* brief in support of Respondents because the issues raised in this appeal are of great importance to both SHRM's members and the business community at large. Reversing the decision below would expose millions of private companies, and their human resource professionals, to onerous investigations and litigation, contrary to Congress' express intent.

SUMMARY OF ARGUMENT

Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX"), 18 U.S.C. § 1514A would impose substantial and unwarranted burdens if applied to millions of private employers and their human resource professionals. Along with their myriad other responsibilities, human resource professionals are called upon to conduct workplace investigations in areas that are familiar to them, including complaints involving workplace discrimination. If SOX were extended to employees of private companies, these human resource professionals would not only be faced with the need to learn unfamiliar securities laws, but they also would be further tasked with conducting complicated fraud investigations.

Section 806 also carries with it the significant danger of frustrated or disgruntled employees advancing contrived allegations of fraud to avoid otherwise legitimate job decisions. Such claims would require costly investigations by employers and effectively turn the at-will employment doctrine on its head. The Court addressed these concerns in the recent *Nassar* decision.

Furthermore, expanding the coverage of Section 806 from employees of about 4,500 publicly traded companies to those employed by some 6 million private entities in the United States inevitably would lead to an avalanche of litigation, clogging the administrative agencies and judiciary and costing small- and medium-sized businesses time and resources they can scarcely afford.

The plain text of Section 806 reveals that it applies solely to publicly traded companies. This conclusion is confirmed by the legislative history of Section 806, as well. Members of Congress uniformly stated that Section 806 applies to "employees of publicly traded companies" only. Likewise, Members of Congress, including Senator Sarbanes himself, confirmed that Section 806 would not reach employees of privately held companies.

The First Circuit's interpretation of Section 806 comports with both the legislative history and the interests of employers throughout the country. The Court should affirm the decision below.

ARGUMENT

1. APPLYING SECTION 806 TO EMPLOYEES OF PRIVATE ENTITIES WOULD UNDULY BURDEN HUMAN RESOURCE PROFESSIONALS AND THEIR COMPANIES

If Section 806 is construed with the tremendous breadth Petitioners suggest, private companies and their human resource professionals would face a rash of substantial burdens. Human

resource professionals would have to invest substantial time and resources in learning the basics of securities and corporate law. These professionals would also have to conduct complicated, far-reaching and expensive internal investigations, overwhelming HR professionals who are already busy with the demands of human capital strategy and workplace compliance. Disgruntled employees or those fearing an imminent adverse action could be tempted to assert contrived allegations of fraud to cloak themselves in the protections of Section 806, in an effort to dissuade their employer from taking lawful actions. Furthermore, an explosion in litigation would inexorably result from making more than six million private employers potentially liable under Section 806, which litigation would lead to excessive fees and costs, and flood the federal courts and agencies, which already are struggling to attend to the backlog of whistleblower retaliation claims. It is entirely "appropriate" for the Court to consider these "practical consequences of an expansion" of the scope of a private cause of action. *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 161, 163, 128 S. Ct. 761, 772 (2008). Based on these consequences, the Court should affirm the decision below.

A. The Application of Section 806 to Private Companies Will Swamp Human Resource Professionals With Time-Consuming Investigations

SHRM is first and foremost concerned about the direct toll that a massive increase in the number of lengthy and costly SOX investigations and

litigation involving private companies will have on its members, human resource professionals, who inevitably will be diverted from other important business initiatives. HR's main function is to align the organization's human capital with business objectives. As such, human resource has more on its plate today than ever before, with responsibility for matters such as recruiting, hiring, orientation, training, employee relations, performance evaluations, compensation, benefits, and employee engagement. Notably, this does not even account for the myriad requirements imposed by federal, state and local laws, such as creating and updating effective policies; administering leaves of absence; maintaining personnel records; addressing requests for accommodation; ensuring workplace diversity and equal employment opportunities; monitoring wage and hour compliance; and handling union relations and grievances. Further, the advent of the Patient Protection and Affordable Care Act carries with it an array of new benefits-related obligations, which will also fall on already strained HR departments.

On top of these regular duties, human resource professionals typically are the first responders to employee concerns and complaints, especially at small- or medium-sized companies. These professionals are trained (and often receive supplemental training) to recognize and respond to alleged violations of employment laws, such as discrimination or harassment complaints. Although such investigations are by no means effortless, human resource professionals have experience balancing the sensitivities of these incidents: managers and human resource professionals

interview witnesses, review personnel documents, and make a determination based on familiar legal standards. If the allegation is valid, human resources can recommend and administer necessary changes to the workplace to remedy the situation.

If private companies are exposed to liability under Section 806, these same human resource professionals will be forced to shoulder enormous new responsibilities. Private companies do not have SOX-mandated audit committees or trained compliance officers versed in corporate fraud and securities law. As such, if SOX is extended to private employers, these companies will turn to the best investigators they have, the human resource department. These professionals would therefore have to invest substantial time and effort to become trained on the complicated and evolving legal standards in this area. Further, once an issue arises, the human resource professionals will have to participate in the lengthy and involved SOX-related investigations. Most smaller businesses have very small human resource departments or may have an employee handling the human resource functions in addition to other duties.[2] Imposing an obligation to ferret out and investigate each and every nebulous allegation of wrongdoing at their company (or even, potentially at the publicly traded company with which they contract) would severely strain their resources and in many cases make it impossible for them to perform other core employee relations functions.

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[2] On average, small businesses have 1 human resource professional for every 100 employees. *See* SHRM HUMAN CAPITAL BENCHMARKING BOOK (2013), at 27-30.

B. An Expansive Reading of Section 806 Would Encourage Misuse by Employees to Avoid Adverse Employment Actions by Their Employers

SHRM is also concerned by the serious potential for abuse that would result from an extension of Section 806 to private employers. Expanding the reach of SOX to employees of six million employers would invite its misuse by frustrated or unscrupulous employees.

The Court recently discussed this very scenario in *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013). The *Nassar* Court rejected a proposal to lower the bar for establishing causation in a Title VII retaliation claim. In so doing, the Court expressly considered the potential for misuse of retaliation claims, which have been proliferating for years. Specifically, the Court imagined the case of "an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or even just transferred to a different assignment or location." *Id.* at 2532. "To forestall that lawful action," the Court noted, the employee could "make an unfounded charge of racial, sexual, or religious discrimination; then, when the unrelated employment action comes, the employee could allege that it is retaliation." *Id.* Determined to avoid such wasteful deceit, the Court rejected the employee's proposed "lessened causation standard." *Id.*

While *Nassar* dealt with Title VII discrimination and harassment complaints, the Court's unease with the misuse of retaliation

protections applies with even greater force in the context of Section 806. The psychology of asserting a claim of discrimination or harassment is far different than asserting a claim of corporate fraud under SOX.

Consider an illustrative hypothetical: John Doe works as a salesperson for Alpha Systems Inc., a Pennsylvania software company with 100 employees. Alpha Systems is privately held, but sells software and services to several major S&P 500 companies. Mr. Doe has missed his sales quota for months, and fears he might be placed on a performance improvement plan, or worse. Desperate to avoid being taken to task for his inadequate performance, Mr. Doe considers lodging some kind of complaint, to stay his manager's hand.

Mr. Doe knows that assertions of discrimination or harassment are protected activity. However, such claims are deeply personal. At bottom, Mr. Doe would be accusing a colleague of being a bigot. Many employees would not contrive such an accusation, even to avoid an adverse employment action. On the other hand, a Section 806 allegation that a corporation has engaged in some financial wrongdoing is abstract and depersonalized. This becomes even more evident when the employee makes an allegation against a third party such as a customer or supplier. While Mr. Doe might not want to accuse his boss of being racist, ageist or sexist, he would have far less compunction in asserting that a customer was cooking its books.

Faced with the choice of either losing his job or convincing himself that a complex financial

transaction was mishandled by a faceless corporation, Mr. Doe may hesitate little in choosing the latter. All he need do is draft a short letter, accusing a customer of submitting false invoices, and deliver his letter to his boss, Vice President of Sales Jane Smith. After reading it, Ms. Smith is at a loss for what to do next. As noted above, private companies do not have internal auditing and compliance personnel trained to analyze allegations of corporate malfeasance. The only thing Alpha Systems can do is give the matter to its two-person human resource department to investigate.

Alpha Systems' human resource professionals, Bill Jones and Anne Brown, are experienced and well trained in recognizing and responding to most employment issues, and have established policies and procedures in place for investigating allegations such as harassment or discrimination. Mr. Jones and Ms. Brown work with managers to interview witnesses, review personnel documents, then make a determination based on familiar legal standards. Through these processes, Alpha Systems is able to separate frivolous claims from those that may have merit.

Mr. Doe's allegations are a horse of a completely different color. Mr. Jones and Ms. Brown understand the basics of retaliation law, but cannot begin to fathom whether Mr. Doe's letter constitutes activity protected by Section 806. They have neither the training nor the background, both because Alpha Systems is privately held and therefore not subject to SOX regulations, and because securities and fraud

issues are simply outside the purview of the typical human resource professional.

To make matters worse, recent pronouncements from the ARB and Courts of Appeals have made the inquiry as to what constitutes "protected activity" even more difficult. The ARB formerly held that to be protected, an employee's communications "must relate definitively and specifically to the subject matter of [the categories listed in Section 806]." *Platone v. FLYI, Inc., ARB* Case No. 04-154 (Sept. 29, 2006). Several Circuits subsequently adopted this relatively clear standard. *See, e.g., Riddle v. First Tenn. Bank*, 497 Fed. Appx. 588, 595, 2012 FED App. 0969N (6th Cir. 2012); *Van Asdale v. Int'l Game Tech.*, 577 F. 3d 989, 997 (9th Cir. 2009); *Day v. Staples, Inc.*, 555 F. 3d 42, 55 (1st Cir. 2009); *Welch v. Chao*, 536 F. 3d 269, 275 (4th Cir. 2008); *Allen v. Admin. Review Bd.*, 514 F. 3d 468, 476 (5th Cir. 2008).

However, the ARB recently reversed itself, rejecting the "definitively and specifically" requirement in favor of a more amorphous, "reasonable belief" standard. *Sylvester v. Parexel International, LLC*, ARB Case No. 07-123 (May 25, 2011). Under this standard, an employee need not show that any fraud actually occurred, only that the employee had a reasonable belief that some generalized notion of fraud or wrongdoing might have occurred.[3] *Id.* The Third Circuit has adopted

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[3] This amorphous standard makes it possible for employees who have already received an adverse act to fabricate instances of "protected activity" *post hoc*. For instance, assume Mr. Doe had been terminated before he could manufacture an explicit

this approach, while the Sixth Circuit tacitly rejected it. *Compare Wiest v. Lynch*, 710 F. 3d 121, 140 (3d Cir. 2013) (embracing "reasonable belief" standard) *with Riddle*, 497 Fed. Appx. at 595 (following "definitively and specifically relate to" standard).

Unable to determine what standard to apply in analyzing Mr. Doe's conduct, Mr. Jones and Ms. Brown are forced to engage legal counsel, incurring significant fees and costs, and further delaying the investigation. Because Alpha Systems is in Pennsylvania, counsel advises that the Company use the "reasonable belief" rubric. Even then, Mr. Jones and Ms. Brown are left with the question of whether "the conduct implicated in [Mr. Doe's letter] could rise to the level of a violation of one of the enumerated provisions in Section 806." *Wiest*, 710 F. 3d at 132. The human resource professionals look into the allegations, but quickly become overwhelmed by reams of unfamiliar documents and obscure regulations. Mr. Jones and Ms. Brown soon recognize that despite their human resource knowledge, neither they nor anyone else at the privately-held Alpha Systems have the expertise to determine whether the conduct ascribed by Mr. Doe to the customer "constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." *Van Asdale*, 577 F.

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complaint of fraud. Mr. Doe could claim that an ambiguous and vague email he sent before his discharge evinces a "reasonable belief" that fraud may have occurred, allowing him to pursue a claim under Section 806.

3d at 996 (bracketed text in original). Alpha Systems' only recourse is to engage outside resources: lawyers, auditors, accountants. Needless to say, the costs of engaging these experts mount quickly.[4] And Alpha Systems is forced to bring its valued customer into the investigation, straining that relationship.

While this investigation proceeds, Alpha Systems finds itself paralyzed not only from holding Mr. Doe to account for his poor performance, but indeed from taking virtually any employment action against him. In *Menendez v. Halliburton, Inc.*, ARB Case No. 09-002 (ARB Sept. 13, 2011), the ARB adopted a fluid standard about what constitutes an "adverse action" under Section 806. In short, any action that is "more than trivial" might be considered an adverse act that would trigger Section 806 liability. *Id.* Alpha Systems cannot arguably even change Mr. Doe's desk, for fear of a retaliation claim.

C. Applying Section 806 to Private Companies Will Expose Them to Burdensome Litigation

SHRM is further concerned with Section 806's capacity to open the floodgates to new whistleblower cases – which have a success rate of only around one percent – and the attendant burdens that will impose on companies, their human resource personnel, government agencies and the judiciary. The Court

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[4] In *Office Depot, Inc. v. National Union Fire Ins. Co.*, 734 F. Supp. 2d 1304 (S.D. Fla. 2010), the court noted that Office Depot incurred $23 million in attorneys' fees and expenses related to an internal investigation regarding securities issues.

shared this concern in *Nassar*. It noted that the growing glut of retaliation cases is adversely affecting "the fair and responsible allocation of resources in the judicial and litigation systems." *Nassar*, 133 S. Ct. at 2531. In the Title VII context, the Court found, "claims of retaliation are being made with ever-increasing frequency," with retaliation claims filed with the EEOC "nearly doubl[ing] in the past 15 years – from just over 16,000 in 1997 to over 31,000 in 2012." *Id.* The *Nassar* Court thus endorsed a narrow interpretation of Title VII's anti-retaliation provisions. *Id.* at 2531-32.

Similar concerns are at play here. From 2005-12, OSHA averaged 216 new SOX retaliation complaints per year – 216 cases that came from only 4,500 publicly traded companies.[5] If some six million privately held companies in the United States are exposed to Section 806 liability, it is plain that the number of SOX complaints filed will increase exponentially. To be sure, privately-held companies tend to be smaller than their publicly traded counterparts. If we assume conservatively that the rate of Section 806 complaints at private companies is only one-tenth that at publicly traded companies, the 216 complaints extrapolate to 28,800 SOX complaints per year. Such a massive increase in the caseload will surely overwhelm the already-overworked professionals at OSHA and the Department of Labor and "just reduce the resources

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[5] Occupational Health & Safety Administration, WHISTLEBLOWER INVESTIGATION DATA: FY2005-FY2013 Q3, http://www.whistleblowers.gov/whistleblower/wb_data_FY05-13-Q3.pdf (2013), at 1.

available to investigate and vindicate claims by employees of publicly traded companies, the statute's main objects." *Fleszar v. U.S. Dep't of Labor*, 598 F. 3d 912, 917 (7th Cir. 2010).

This explosion in SOX litigation would be particularly problematic for private companies, because litigation under that statute imposes unjustifiably great costs. Returning to our hypothetical involving Mr. Doe, assume that after determining his assertions to be groundless and advanced in bad faith, Alpha Systems placed Mr. Doe on a performance plan, and terminated him when his sales numbers failed to improve. Mr. Doe retains an attorney, who proceeds to file a Section 806 complaint against Alpha Systems with OSHA (the agency charged with investigating SOX retaliation claims).[6] Alpha Systems soon discovers that Section 806's procedures allow Mr. Doe three bites at the apple. After receiving Mr. Doe's complaint, Alpha Systems engages legal counsel and submits a position statement. Within 60 days, an OSHA investigator issues a preliminary order,[7] finding that Mr. Doe cannot state a *prima facie* case under Section 806 and recommending dismissal. Nonetheless, Mr. Doe is entitled to ask for a *de novo* review by an administrative law judge.[8] The ALJ again finds for Alpha Systems. Still, because 180 days have not yet passed since the filing of the complaint, Mr. Doe can remove his case to district

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[6] 29 C.F.R. § 1980.103(a).
[7] 29 C.F.R. § 1980.105(e).
[8] 29 C.F.R. § 1980.106(a).

court for yet another *de novo* review by an Article III judge, through full-blown litigation.[9]

Of course, where there is litigation there are legal fees, and other expenses. Section 806 lawsuits are particularly complicated and costly, because they present "a securities fraud claim wrapped inside a retaliation claim."[10] Litigation involving the standard issues in a retaliation case – causation, motive and intent, *see Clark County School Dist. v. Breeden*, 532 U.S. 268, 272 (2001) – can be involved. Adding in the attendant investigation, discovery and analysis of the securities piece of the claim can multiply the costs of litigation dramatically. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164, 189 (1994) (noting the "large sums even for pretrial defense and the negotiation of settlements" of securities actions, in which companies "pay $8 in legal fees for every $1 paid in claims"). Further, since Mr. Doe's allegations were against the customer, that company would receive invasive and wide-ranging subpoenas as well, dragging an otherwise uninvolved third party into the litigation.

In *Stoneridge Investment Partners*, the Court acknowledged the danger of "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow[ing] plaintiffs with weak claims to extort settlements from innocent companies." 552

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[9] 18 U.S.C. § 1514A(b)(1)(B); 29 C.F.R. § 1980.114(a). Alternatively, an aggrieved party can have the Administrative Review Board address the ALJ's findings. 29 C.F.R. § 1980.110(a).

[10] Respondent's Br., at 39.

U.S. at 163. The Court there thus rejected a proposed expansion of a cause of action. *Id.* So too with Mr. Doe and Alpha Systems: even though his Section 806 claims are wholly groundless, Alpha Systems would be forced to seriously consider settling the case, to avoid high costs and fees connected with the onerous discovery and complicated legal analysis. The injustice of extracting settlements from Section 806 cases is particularly stark given claimants' extremely low success rate with Section 806 claims – out of 1,700 cases resolved by the Department of Labor from 2005-12, only 18 or 1.05 percent received merit findings.[11]

It is "inconsistent with the structure and operation of [Section 806] to so raise the costs, both financial and reputational," on a private employer "whose actions were not in fact the result of any discriminatory or retaliatory intent" – particularly given that there is no reason to believe that private employers are covered by Section 806 in the first place. *Nassar*, 133 S. Ct. at 2532; *see Stoneridge Investment Partners*, 552 U.S. at 163 (rejecting expansion of "[a]doption of petitioner's approach would expose a new class of defendants to these risks" attendant with litigation). The Court should therefore affirm the decision below.

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[11] Occupational Health & Safety Administration, WHISTLEBLOWER INVESTIGATION DATA: FY2005-FY2013 Q3, http://www.whistleblowers.gov/whistleblower/wb_data_FY05-13-Q3.pdf (2013), at 4-8. For the first three quarters of 2013, zero cases received a merit finding. *Id.*

II. THE LEGISLATIVE HISTORY UNEQUIVOCALLY DEMONSTRATES THAT CONGRESS DID NOT INTEND SECTION 806 TO APPLY TO EMPLOYEES OF PRIVATE COMPANIES

A reading of the legislative history further shows that the decision below must stand. SHRM adopts the extensive analysis offered by Respondents regarding the interpretation of Section 806 (Br. at 13 - 30), and agrees with Respondents and the court below that the plain text of the statute alone is dispositive of this matter. Nonetheless, if the Court finds any ambiguity in this Section, SHRM notes that the legislative history regarding SOX's whistleblower provisions uniformly supports Respondents' position. Congress made plain that Section 806 applies solely to employees of publicly traded companies, not private entities, even those that are "contractors or subcontractors" to public companies. The Senate Report discussing what would be enacted as Section 806 repeatedly notes that it would apply to employees of public companies only:

- The Report emphasizes, "[a]lthough current law protects many government employees who blow the whistle on fraud and protect investors, there is no similar protection for employees of publicly traded companies who blow the whistle on fraud and protect investors." S. Rep. no. 107-146, at 9 (emphasis supplied).
- "This section [enacted as Section 806] would provide whistleblower protection to employees of publicly traded companies. It

specifically protects them when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping fraud." S. Rep. no. 107-146, at 11.

- "Section 6 of the bill [enacted as Section 806] would provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company. Although current law protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for employees of publicly traded companies who blow the whistle on fraud and protect investors." S. Rep. no. 107-146, at 15 (emphasis supplied).
- "The bill does not supplant or replace state law, but sets a national floor for employee protections in the context of publicly traded companies." S. Rep. no. 107-146, at 16 (emphasis supplied).

The Congressional Record similarly reveals that Senator Leahy, in discussing the whistleblower provisions, noted it "would provide whistleblower protection to employees of publicly traded companies who report acts of fraud," because "[a]lthough current law protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for

publicly traded companies." 148 Cong. Rec. 1787-88 (daily ed. Mar. 12, 2002).

The government suggests, "'[N]othing in the legislative history' shows an affirmative congressional intent to 'limit whistleblower protection to employees of public companies.'" Gov't Br. at 22 (quoting Pet. App. 60a-61a (Thompson, J., dissenting)). It is clear this statement is at odds with the legislative record, and simply incorrect.

In their Briefs, Petitioners and the government likewise try to manufacture Congressional "intent" in support of their position through oblique implication: because Congress noted the involvement of private accountants and law firms in the Enron fraud, it therefore intended that all private employers would be covered by Section 806. Even if one were to indulge this dubious leap in logic, the actual legislative history is completely to the contrary. It shows that Congress intended to exclude private companies from the scope of this law. By way of example, in considering the conference report on SOX July 25, 2002, Senator Sarbanes himself made plain that SOX's coverage would be limited to publicly traded companies:

> Before addressing the major provisions of the legislation, let me make very clear that it applies exclusively to public companies – that is, to companies registered with the Securities and Exchange Commission. It is not applicable to pr[ivate] companies, who make up the vast majority of companies across the country.

148 Cong. Rec. S7351 (daily ed. July 25, 2002) (emphasis supplied). Representative Etheridge similarly stated that the bill "regulates public corporations, not privately-held companies [because] [b]y accepting money from private citizens, these corporations bear a special responsibility to their investors and need to be held accountable." 148 Cong. Rec. H5474 (daily ed. July 25, 2002). Senator Murray echoed this: "[f]irst, the bill limits its scope to publicly held companies." 148 Cong. Rec. S7351 (daily ed. July 5, 2002) (emphasis supplied).

Nowhere in the legislative history is there any statement by any Member of Congress that the SOX whistleblower protections should apply to employees of private companies, contractors, subcontractors or otherwise. Petitioners' and the governments' position thus relies solely on strained inference, which is directly and repeatedly rebutted by statements made by those legislators in Congress who commented on the limited application of SOX to publicly traded companies.

The legislative history is also bereft of any discussion of the significant burdens that Section 806 would impose on virtually every company in the United States, as well as the significant restrictions that it would place on employers' common law rights. "[W]here a common-law principle is well established ... the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108, 111 S. Ct. 2166, 2170 (1991) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S.

779, 783, 72 S. Ct. 1011 (1952)). Thus, "when a statute covers an issue previously governed by the common law, [the Court will] interpret the statute with the presumption that Congress intended to retain the substance of the common law." *Samantar v. Yousuf*, 560 U.S. 305, 130 S. Ct. 2278, 2289 n.13 (2010). It is inconceivable that Congress would foist the substantial limitations and burdens discussed *supra* on nearly every business *sub silentio*, without any indication of such intent in either the statute or the legislative record.

Furthermore, when restricting the traditional, common-law rights of an employer, Congress has always taken pains to exclude from a statute's coverage entities that would be unduly encumbered by its requirements. For instance, Title VII and the Americans with Disabilities Act apply to employers with fifteen or more employees only;[12] the Age Discrimination in Employment Act, twenty or more;[13] and the Family and Medical Leave Act, fifty or more.[14] *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 504, 126 S. Ct. 1235, 1239 (2006). In both Section 806 and its legislative history, Congress limited SOX retaliation claims to publicly traded companies, alone. To read this limitation out of Section 806 would be contrary to both Congress's intent and the rights of millions of employers, regardless of their size. The decision below recognizes these issues, and therefore should be affirmed.

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[12] 42 U.S.C. § 2000e(b); 42 U.S.C. § 12111(5)(A).
[13] 29 U.S.C. § 630(b).
[14] 29 USC § 2611(4)(A)(i).

III. CONCLUSION

For the foregoing reasons, SHRM asks that the Court affirm the decision below.

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